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No. 9748

Vol 2268

United States Circuit Court of Appeals

For the Ninth Circuit.

COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Political Subdivision of the State of California),

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 240

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

FILED

APR - 9 1941

PAUL P. O'BRIEN,

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9748

United States

Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court for the Northern District of California

No. 21467L

UNITED STATES OF AMERICA,
Plaintiff,

vs.

COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Political Subdivision of the State of California), CENTRAL PACIFIC RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY,
Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

Comes now the United States, by its attorney Frank J. Hennessy, and for cause of action against the above-named defendants, complains and alleges:

1. The County of Alameda was at all times herein mentioned, and now is a body corporate and politic, and a political subdivision of the State of California. The Central Pacific Railway Company, and the Southern Pacific Company are corporations, duly authorized and licensed to do business within the State of California, and are engaged in the business of operating railroad lines within and without said State and are the owners of, or claim some interest in, certain railway rights of way within the said County of Alameda in or over the tidal canal described hereafter. [1*]

2. This action arises under §24 (1) and §274 (d) of the Judicial Code as amended (48 Stat. 955; as amended August 30, 1935, c. 829, Sec. 405, 49 Stat. 1027.)

3. The City of Alameda and the City of Oakland are both situated upon the east shore of San Francisco Bay, a navigable body of water. Both said cities are located within Alameda County State of California, and are separated from each other by a navigable body of water known at various times and in various quarters by the following names: San Antonio Estuary, Oakland Estuary, Oakland Harbor, Inner Harbor and Tidal Canal and Alameda Estuary. Said body of water, or the estuary tidal canal is roughly seven miles in length, extending in a general east and west direction from San Leandro Bay, an arm of San Francisco Bay, on the east, to

*Page numbering appearing at foot of page of original certified Transcript of Record.

another point in San Francisco Bay proper at the end of the moles of the Southern Pacific Railroad Company and the Western Pacific Railroad Company on the west. Said Estuary constitutes what is commonly known as Oakland's inner harbor; the outer harbor extending in a northeasterly direction for about two miles from the entrance to the inner harbor. The westerly end of the Estuary, for a distance of about two miles, is an entrance channel, protected by stone retaining walls on either side. Said entrance channel varies from Seven Hundred and Fifty to Eight Hundred and Fifty feet in width. Immediately west of said entrance channel lies the main portion of the inner harbor, with docking facilities; the width of the channel here being Six Hundred feet, and the natural harbor varying from Six Hundred and Fifty feet at the narrowest points to about Three Thousand Five Hundred feet at the easterly end where the harbor widens to form what is known as Brooklyn Basin, which is used as a turning basin. [2]

The natural channel from the ends of the jetties at the mouth of the Estuary to Brooklyn Basin has been deepened by the United States by dredging. Easterly of Brooklyn Basin and forming a continuous part of the same body of water is a "Tidal Canal", connecting the inner harbor with San Leandro Bay. Said Tidal Canal was originally dredged by the United States as an aid to navigation in the inner harbor; the purpose of said canal being to increase the tidal flow to and from San Leandro

Bay to secure the benefit of its scouring action in keeping the channel free from deposit. Said Tidal Canal is nearly two miles in length and about Three Hundred feet in width and has been deepened from time to time since 1882 by the United States.

4. In the year 1874 Congress enacted the Rivers and Harbors Act for that year, in which the sum of $100,000 was appropriated "for the improvement of Oakland harbor;" to be expended under the direction of the Secretary of War (18 Stat. 237, c. 457). Shortly prior to 1882 the United States instituted a condemnation proceeding in the District Court of Third Judicial District in and for the State of California (now the Superior Court of the State of California, in and for the County of Alameda) to acquire a right of way for the present Estuary tidal canal, said action being entitled The United States, plaintiff, v. Crooks, County of Alameda, Central Pacific Railroad Company et al., defendants, action No. 3590 in the Records of the County Clerk of the County of Alameda for the District Court of the Third Judicial District the State of California, in and for the County of Alameda. [3]

5. In said suit the County of Alameda and the railroad were named, among others, as defendants and the United States sought to condemn the right of the County and of the railroad in certain highways which crossed the proposed Estuary tidal canal at the places where the Fruitvale Avenue, High and Park Street bridges are now located, and

at Washington Avenue, where a bridge was then located.

The County of Alameda and the railroad company asked for no damages in said condemnation proceedings, and in the decree in said action it was provided, among other things:

> "Defendants, the County of Alameda, The Central Pacific Railroad Company, Charles Heinicke and S. A. Smith, not having claimed damages, no damages are awarded to them.
>
> "It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the lines of said canal."

A full, true and correct copy of said decree is attached hereto marked Exhibit I.

6. In accordance with decree of condemnation, the United States constructed highway drawbridges at Park Street and High Street, and a combined highway and railroad drawbridge at Fruitvale Avenue over said tidal canal, and, as a part of the improvement of Oakland Harbor, the United States improved and deepened the channel of said canal, but the same was not opened to navigation. The Park Street bridge was completed in 1891, and the High Street and Fruitvale Avenue bridges were

completed in 1901. The bridges were constructed as drawbridges but were equipped only with hand-operated machinery. [4]

7. Prior to the institution of said condemnation proceedings the Central Pacific Railroad Company (predecessor of respondent Central Pacific Railway Company) was the owner of two lines of rail road extending across the lands sought to be condemned. One line of said railroad was on or adjoining Fruitvale Avenue, and the other line was on or adjoining Washington Avenue, across the site of the proposed tidal canal, in said Alameda County, and the said Central Pacific Railroad Company was the owner of rights of way in said two lines of railroad, and was a party defendant in said condemnation proceedings.

8. On March 7, 1901, an agreement in writing was entered into between the United States, Central Pacific Railway Company (said Central Pacific Railway Company having succeeded to the interest of said Central Pacific Railroad Company) and the Southern Pacific Company (lessee of Central Pacific Railway Company), under which agreement the Central Pacific Railway Company in consideration of $50,000 agreed to abandon its line of railroad on or adjoining Washington Avenue, and to relieve the United States of any obligation to construct or maintain a drawbridge across said tidal canal at Washington Avenue. A full and true copy of said agreement is attached hereto marked Exhibit II.

9. On December 6, 1909, the Board of Supervisors of Alameda County adopted a resolution whereby the County agreed

> "to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the water front of the tidal canal and establish harbor lines so as to permit the construction of wharves and docks;" [5]

A full and true copy of said resolution is attached hereto marked Exhibit III.

10. In the Rivers and Harbors Act, approved June 25, 1910 (36 Stat. 630, c. 382), under the clause of appropriations therein for "Improving harbor at Oakland, California," it is provided, inter alia:

> "Provided Further: That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just

to the United States and to said local authorities. Provided Further: That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer."

In accordance with the discretion granted to the Secretary of War by said Act and in order to meet the terms of said transfer, and with the full knowledge and acquiescence of the railroad companies, the United States installed electrical operating machinery on each of said bridges; deepened and dredged said tidal canal and opened it to navigation; established harbor lines so that wharves and docks could be constructed; and did all other things required by said county as set forth in said Resolution of its Board of Supervisors of December 6, 1909 (Exhibit III). The total amount expended by the United States in this connection was $513,000.

11. Thereafter, on September 5, 1910, the Secretary of War, acting within the discretion granted to him by Congress in the Rivers and Harbors Act of June 25, 1910, and with the knowledge of said railroad companies, issued a license whereby the said Secretary of War granted [6]

"unto the Board of Supervisors of Alameda County, California, a License, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United

States in connection with the improvement of Oak*dale* Harbor, California."

A full and true copy of said License is attached hereto marked Exhibit IV.

12. Thereafter, on November 10, 1913, the Board of Supervisors of Alameda County adopted a resolution accepting said License, in which, among other things, it was recited:

"Whereas, the United States had put all three bridges in condition for operation of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished bridge-tenders' houses and highway gates; and, also overhauled all old machinery and put it in good order for operation, under the new conditions as required by paragraph 3 of said license, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

"Be It Resolved that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the said three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor, to-wit, the Park Street Bridge, the Fruitvale Avenue Bridge, and the High Street Bridge, subject to the conditions and provisions of the aforesaid License of September 3, 1910. Said acceptance being effective from and after Monday, November 17, 1913."

A full, true and correct copy of said Resolution is attached hereto marked Exhibit V.

13. Thereafter the said County of Alameda, with the full knowledge and acquiescence of said railroad companies, operated and kept said bridges in repair, and has replaced or rebuilt the bridge at Park Street, and is now engaged in constructing a new bridge at High Street. [7]

14. The Fruitvale Avenue Bridge is a combination vehicular, pedestrian and railroad swing span bridge, built upon a single concrete center pier, and has been operated and repaired since November 17, 1913, by the County of Alameda as hereinabove alleged. Said bridge is used by the Southern Pacific Company to operate both freight and interurban passenger trains over the same. This bridge connects residential and industrial sections of the City of Alameda with similar sections of the City of Oakland via Fruitvale Avenue, which Avenue is also a principal thoroughfare cutting through all the main traffic arteries between the Estuary tidal canal and the countryside. The Fruitvale Avenue bridge carries the only rail connection, both freight and interurban between the mainland and the City of Alameda, which is entirely surrounded by water.

The population of the County of Alameda has increased from 130,197 in 1900 to 474,883 in 1930, and at the present time approximately 135,000 vehicles (exclusive of railroad equipment) cross the Fruitvale Avenue bridge each thirty days.

15. Under the supposed authority of a decision, dated April 12, 1939, of the District Court of the Third Appellate District of the State of California, in a cause entitled County of Alameda (a body Corporate and Politic and a Political Subdivision of the State of California) v. Horace P. Ross, as Auditor of the County of Alameda, Civil No. 6184 (97 Cal. App. 166) said county notified the United States on September 28, 1939, that at midnight, December 31, 1939, said county will cease to operate said Fruitvale Avenue bridge. A full and true copy of said notice is attached hereto marked Exhibit VI. Said county has since agreed to operate said bridge until March 31, 1940, but, by such action, it has waived no rights it may have in the premises.

[8]

16. Neither the United States, nor any of its officers was a party to said action referred to in the preceding paragraph, nor were any of the pleadings in said action ever served upon the United States or any of its officers, and the United States never had an opportunity to appear in said action.

17. The offer of said County of Alameda to accept the burden of maintenance, operation, and repair of said Fruitvale Avenue Bridge set forth in the Resolution of its Board of Supervisors dated December 6, 1909, (Exhibit III); the acceptance of said offer by the expenditure of the sum of $513,000 as alleged in paragraph 10, and the issuance of the

License by the Secretary of War on September 3, 1910, (Exhibit IV); and the ratification of the same by the Board of Supervisors of said county on November 10, 1913, (Exhibit V) and the long-continued compliance therewith by said county, constitute a valid and binding contract between the United States and the said county. That because of the threatened breach by said county of said contract the Central Pacific Railway Company, and the Southern Pacific Company served a notice upon the United States on July 27, 1939, that the United States "comply with the decree in the case of United States v. Crooks and others, * * * which decree was entered November 4, 1882 * * * and to cause this drawbridge (at Fruitvale Avenue) to be inspected, maintained and renewed * * *." A full and true copy of said notice is attached hereto marked Exhibit VII. The United States denies that any obligation now rests upon it to operate, maintain, repair or rebuild said bridge.

18. The District Court of Appeal, of the State of California, in and for the Third Appellate District, had no jurisdiction to set [9] aside the agreement between the said County of Alameda and the United States referred to in the preceding paragraph for the reason that the United States was not a party to the proceeding entitled Alameda County etc., v. Ross, referred to in paragraph 15 herein, and no process in said action was ever served upon the United States, and said court had no jurisdiction

to determine substantial rights of the United States in said action.

19. The District Court of Appeal, of the State of California, in and for the Third Appellate District, had no jurisdiction in the action entitled Alameda County, etc., v. Ross, to determine that the Secretary of War improperly or illegally exercised a discretion granted to him by Congress in the issuance of the said License dated September 3, 1910.

20. In consideration of the offer by said County of Alameda, as set forth by the Resolution of its Board of Supervisors, dated December 6, 1909 (Exhibit III), the United States expended the sum of $513,000 in the installation of electrical operating machinery on each of said bridges; in deepening and dredging said tidal canal so that it could be opened to navigation; and in establishing harbor lines, and said county has had the benefit of said works since November 17, 1913, and is now estopped to question the validity of the agreement constituted by the offer of said county to accept the burden of maintenance, operation and repair of said Fruitvale Avenue Bridge (Exhibit III), the acceptance of said offer by the Secretary of War (Exhibit IV), and the ratification of the case by said county (Exhibit V).

21. The United States operated, maintained, and kept in repair the said bridge at Fruitvale Avenue from 1901, when said bridge was completed, until November 17, 1913, when said bridge was turned over to said county as hereinabove alleged. In con-

sideration of the offer [10] of the County of Alameda to operate, maintain and repair said bridges the United States also expended the sum of $513,000 in installing electrical operating machinery on said bridges, and in deepening the channel of said tidal canal and establishing harbor lines. Said sum of $513,000 was so expended by the United States between December 6, 1909, when the county made said offer (Exhibit III) and November 17, 1913, when said county accepted the license issued by the Secretary of War (Exhibit V), and the operation of said bridge and said sum constitute just compensation paid by the United States for the taking of the bridge sites, and any attempt on the part of said county, or the Central Pacific Railroad, or the Southern Pacific Company to compel the United States to pay any further sum, either to operate, repair, or replace the bridge at Fruitvale Avenue, or otherwise, is in violation of the agreement between said county and the United States that said county would operate, maintain and repair said bridge, and is without the jurisdiction of any court.

Wherefore, plaintiff prays:

1. That this court order specific performance by the county of Alameda of its agreement with the United States to operate, maintain or rebuild the bridge at Fruitvale Avenue in compliance with the agreement alleged in paragraph 17 herein, and that the United States be relieved of all liability in this regard.

2. That this court order, adjudge and decree that the contract between the County of Alameda and the United States, alleged in paragraph 17 herein is now, and has been since the 17th day of November, 1913, in full force and effect, and that under said contract the County of Alameda is obligated to repair, maintain, operate and replace the bridge at Fruitvale Avenue in accordance with the terms of the License issued by the Secretary of War on September 3, 1910, and accepted by the county on November 10, 1913. [11]

3. That this court order, adjudge and decree that any rights that the defendant railroad companies may have in the said Fruitvale Avenue Bridge are subject to the contract between the County of Alameda and the United States alleged in paragraph 17 herein, and that with the full knowledge, consent and acquiescence of said railroad companies a novation has taken place whereby the said county has been substituted for the United States in all things to be done or performed for the benefit of said railroad companies under said decree of condemnation mentioned in paragraph 4 herein.

4. That this court order, adjudge and decree that said County of Alameda is now estopped to deny or question the validity of the contract between said county and the United States alleged in paragraph 17 herein.

5. That this court order, adjudge and decree that the operation, repair and maintenance of said Fruit-

vale Avenue Bridge by the United States from the date of its completion in 1901, to November 17, 1913, and the expenditure of the sum of $513,000 by the United States between December 6, 1909, and November 3, 1913, as alleged in paragraph 22 herein, constitutes just compensation paid by the United States for the condemnation and taking of said bridge sites, and that since November 17, 1913, there has been no obligation on the United States to expend any further sum to operate, maintain, repair, or replace said Fruitvale Avenue Bridge, either for the benefit of said county or for the benefit of said railroad companies, or either of them.

6. That pending the filing of an answer, and the hearing and final determination of this cause, this court issue an injunction pendente [13] lite restraining the said county and the railroad companies, their officers, agents and employees, from in any way varying, rescinding, revoking or nullifying the terms of the contract between the United States and said county alleged in paragraph 17 herein, or from failing or neglecting to repair, maintain, operate and replace said bridge at Fruitvale Avenue in accordance with the terms of the License issued by the Secretary of War on September 3, 1910, and accepted by the county on November 10, 1913, or

in the alternative

that this cause be advanced for a speedy hearing and determination as provided by Rule 57 of the Rules of Civil Procedure, so that a final judgment may be entered herein prior to March 31, 1940.

7. That the rights of all parties under the decree of 1882, and under the License issued by the Secretary of War on September 3, 1910, and accepted by the county on November 10, 1913, be defined and declared.

8. For such other and further relief as to the court may seem just and meet, and for costs.

FRANCIS M. SHEA,
Assistant Attorney General.
FRANK J. HENNESSY,
United States Attorney.
BRICE TOOLE,
Attorney Department of Justice.

[Endorsed]: Filed Jan. 17, 1940. Walter B. Maling, Clerk, By C. C. Evensen, Deputy Clerk. [14]

EXHIBIT I

DECREE IN CONDEMNATION PROCEEDINGS [15]

In the Superior Court of the County of Alameda, State of California. No. 3590 in the late 3rd District Court.

The United States

Plaintiff

v.

Susan Crooks, Executrix of the last will and Testament of M. Crooks, deceased, J. D. Farwell, Mrs. E. Farwell, R. Simson, H. Gibbons, Alameda County, A. A. Cohen, Central Pacific Railroad Company, P. Sather, J. M. Valdez and W. H. Glascock, G. G. Briggs, A. Ford, Charles Meinicke, T. A. Smith, Oakland Water Front Company, Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander and Marion Alexander, B. S. Brooks, A. E. Davis, H. W. Carpentier, O. Eldridge, John Caperton, J. G. Kellogg, G. H. Mendell, E. B. Mastick, Mrs. Frances E. Page, C. S. Stewart, G. W. Dent,

Defendants.

DECREE

This cause came on regularly for trial before the Court, a trial by jury having been expressly waived,

and it being stipulated that the same be tried by the Court sitting without a jury, the parties by their respective Attorneys being present in Court and consenting thereto:

It having been suggested to the Court that since the commencement of the action defendant M. Crooks had died, on motion Susan Crooks, Executrix of the last Will and Testament of Mathew Crooks, deceased, was substituted as defendant in place of said M. Crooks, deceased; also that defendant B. S. Alexander had died, and that his estate had been settled closed and distributed to his heirs Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander, and Marion Alexander, on motion said heirs were substituted as defendants in place of [16] said B. S. Alexander, deceased. It also appearing that defendant Charles Meinicke had since the commencement of the action succeeded to the interest of defendants M. Klinkofstrom, C. H. Stirling, H. Hansman, Charles Baum, Gottlieb Muecke, H. A. Gildemeister, Edmund Janssen, and Frederick Roeding, on motion said defendant Meinicke was substituted as defendant for said other last named defendants. And it further appearing that since the commencement of said action A. E. Davis had succeeded to the interest of defendants Caroline E. Chipman, E. Forge, J. C. Hayes, Annis Merrill, Mary A. Fitch, Thadeus S. Fitch, S. A. Chapin, C. C. Stevens, Wm. McAfee, James Spiers and Nathan Porter, on motion said Davis was substituted as defendant in place of said former defendants Chipman, Forge, Hayes, Merrill, Fitch—M. A. and T. S., —Chapin,

Stevens, McAfee, Spiers and Porter. And it further appearing that defendant H. W. Carpentier had since the commencement of said action succeeded to the interest of defendants John Stroufe, C. H. Bradley, Eli Corwin and H. M. Whitney, on motion said H. W. Carpentier was substituted as defendant for said defendants Sroufe, Bradley, Corwin and Whitney.

Whereupon a large number of witnesses were produced on the part of the plaintiff and the defendants examined, and documentary and written testimony introduced, and the testimony being closed, the cause was argued by the respective counsel and submitted to the court for consideration and decision; and after due deliberation thereon the Court delivered its findings and decision in writing which were filed herein on the 25th day of September 1882.

Wherefore by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that the plaintiff herein have judgment for the condemnation of the tract or [17] strip of land, in the Complaint and said findings set forth and herein after described, upon the payment to the defendants of the sums of money *respecttively* found to be due them as damages assessed for the taking of said land, as set forth in said findings or that said plaintiff deposit in Court the aggregate sum so found due the defendants, to wit, the sum of Thirty nine thousand six hundred and ninety six (39696.00) Dollars for the said defendants respectively to be dis-

tributed to them according to said findings, towit:

To defendant Susan Crooks, executrix of the last Will and Testament of M. Crooks, deceased, and substituted as defendant in this proceeding in place of said M. Crooks, deceased, Two hundred and seventy four (274) Dollars:

To defendant Mrs. E. Farwell, Seven hundred and ninety five (795) Dollars:

To defendant R. Simson, Twelve hundred and forty two (1242) Dollars:

To defendant H. Gibbons Three thousand (3000) Dollars:

To defendant A. A. Cohen, Two thousand one hundred and seventy six (2176) Dollars:

To defendant P. Sather, Nine thousand four hundred and five (9405) Dollars:

To defendants J. M. Valdez and W. H. Glascock Fifteen thousand six hundred and sixty four (15664) dollars:

To defendant G. G. Briggs Two thousand five hundred and forty eight (2548) Dollars:

To defendant A. Ford Seven hundred and twelve (712) Dollars:

To defendants Oakland Water Front Company, Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander, Marion Alexander, B. S. Brooks, A. E. Davis, H. W. Carpentier, [18] O. Eldridge, John Caperton, J. G. Kellogg, G. H. Mendell, E. B. Mastick, Mrs. Frances E. Page and C. S. Stewart, Three thousand Eight hundred and Eighty (3880) Dollars:

Defendants the County of Alameda, the Central Pacific Railroad Company, Charles Meinicke and T. A. Smith—not having claimed damages, no damages are awarded to them.

It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all roads now used as public highways, crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the line of said canal.

The description and particular boundaries of said parcel or strip of land hereby ordered to be condemned for the public use and purpose of said tidal canal are as follows towit: [19]

* * * * * * * *

In the Superior Court of the County of Alameda,
State of California
No. 3590 in late 3rd District Court

THE UNITED STATES,

Plaintiff,

vs.

M. CROOKS et al.,

Defendants.

This cause came on for trial on the 7th day of December, 1881. Before the trial, in consequence of the death or transfer of interest of some of the original defendants the representatives or succes-

sors in interest of such defendants respectively were thereupon, on motion and by consent of the respective parties, substituted in place of the said former defendants, deceased, or who had transferred their interest, to wit:

Susan Crooks, in place of M. Crooks, deceased; Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander and Marion Alexander in place of B. S. Alexander, deceased;

Defendant Charles Meinicke in place of M. Klinkofstrom, C. H. Strybing, H. Hansmann, Charles Baum, Gottlieb Muecke, H. A. Gildemeister, Edmund Janssen and Frederick Roeding, whose interests were transferred to said Meinicke;

A. E. Davis in place of Caroline E. Chipman, E. Forge, J. C. Hayes, Annis Merrill, Mary A. Fitch, Thadeus S. Fitch, S. A. Chapin, C. C. Stevenson, Nathan Porter, Wm. McAfee and James Spiers whose interests were transferred to said Davis Defendant H. W. Carpentier in place of John Sroufe, C. H. Bradley, Eli Corwin and H. M. Whitney, whose interests were transferred to defendant Carpentier;

And the said several parties by their Attorneys in [27] open Court, expressly waived a jury and consented and agreed to a trial by the Court sitting without a jury.

The trial thereupon proceeded before the Court sitting without a jury, and was continued from time to time, a large number of witnesses being produced and examined by their respective parties and docu-

mentary and written testimony introduced. And thereafter the case was argued by counsel for the respective parties, and on the 1st day of June 1882, was finally submitted to the Court for its decision.

And now having fully considered the case the Court finds and renders its decision as follows, to wit:

That the plaintiff, the United States of America, is duly authorized and empowered to improve Oakland Harbor in the said County of Alameda, State of California, in the interest of commerce, and said Harbor is a public navigable Harbor; and that to carry out the improvement of said Oakland Harbor, it is necessary to turn the water from San Leandro Bay or Estuary into and through San Antonio Estuary, which latter forms Oakland Harbor, for the purpose of removing the sediment from the same thereby increasing the depth of water in said Harbor. That to turn the tide water from San Leandro Bay to the head of Oakland Harbor it is necessary to cut a canal through the low neck of land lying between the two bays or Estuaries.

That for a canal to answer the purpose contemplated it will require the strip of land mentioned in the complaint and delineated on the map of survey, attached to said complaint and hereafter described, and that it is necessary to take said strip of land over and across which to make and excavate said canal.

That the use for which said strip of land is to be taken, to wit, said tidal canal, is a public use au-

thorized by law and by the government of the United States; that such taking [28] is necessary to such use.

That the location of said proposed canal, as hereinafter particularly described, has been made in the manner which will be most compatible with the greatest public good and will do the least private injury.

That the public use herein mentioned is a more necessary public use than that to which any portion of said strip of land has already been appropriated.

That the said strip of land to be taken is more particularly bounded and described as follows, to wit: [29]

* * * * * * *

That said property so sought to be condemned is of the value of $39,696.00.

That said tract or strip of land sought to be condemned consists of different parcels owned and claimed by different parties, to wit: said defendants severally; and the value of each of said different parcels and each estate and interest therein separately assessed, are as follows to wit: [35]

* * * * * * *

That G. W. Dent a defendant herein filed an Answer setting up some claim to the Marsh land in controversy which claim to said and other Marsh lands has been adjudicated in this Court as to said title to said March land and the claim of said Dent thereto, and the title and claim of said Dent thereto was by said Court decided to be invalid.

There are no damages to the property sought to be condemned by reason of its severance from the portion sought to be condemned and the construction and the improvement in the manner proposed by the plaintiff.

That it is necessary to construct and keep in repair good and sufficient bridges across said canal and all the public roads and railroads now leading from the town of Alameda across the line of said proposed canal and all roads now used as public highways whether so declared or not.

CONCLUSIONS OF LAW

From the foregoing facts the Court finds as a conclusion of law that the plaintiff is entitled to a judgment and decree condemning said tract or strip of land herein first described for the public use aforesaid upon paying the amount of damages herein assessed to the parties entitled thereto, respectively, or their attorneys, or by paying the aggregate sum assessed as damages into this Court for said respective parties.

That in the construction of said canal the plaintiff at its own cost, construct and keep in repair suitable bridges, across the same on all the Public highways and railroads now crossing the line of said canal and all roads now used as public highways whether so declared or not and It Is So Ordered.

N. HAMILTON,
Judge. [54]

In the Superior Court of the County of Alameda, State of California

THE UNITED STATES,

Plaintiff,

vs.

M. CROOKS et *als,*

Defendants.

I, Andrew Ryder, County Clerk of the County of Alameda, State of California, ex-officio Clerk of the Superior Court, in and for said County, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled action, and recorded in Judgment Book 3 Dept. 1 of said Court, at page 302. And I further certify that the foregoing papers hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and the seal of said Superior Court this 4th day of Nov., A. D. 1882.

State of California,
County of Alameda—ss.

I, John P. Cook, County Clerk of the County of Alameda, and ex-officio Clerk of the Superior Court thereof which said Superior Court is the successor to the Third District Court of the Third Judicial District of the State of California, do hereby certify that the foregoing are true and correct copies of all the papers constituting the Judgment Roll in the cause of The United States, Plaintiff vs. M.

Crooks et al, Defendants, which cause is No. 3590 of the Third District Court of the County of Alameda, State of California, as said papers are of file and record in the office of the said Superior Court.

I do further certify that I have made diligent search for certain maps introduced and filed as exhibits in said cause, but have been unable to find them or any of them and believe that said maps are not at present on file in this office.

In Witness Whereof I have hereunto set my name and affixed the official seal of the Superior Court aforesaid at my office in the City of Oakland, County of Alameda, State of California, this 21st day of November, A. D. 1905.

JOHN P. COOK,
County Clerk and ex-officio Clerk of the Superior Court of the County of Alameda, State of California. [55]

EXHIBIT II

Agreement of March 7, 1901. [56]

A.

This Agreement, made and entered into this Seventh (7th) day of March A. D. 1901, between the United States of America, the Central Pacific Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and the Southern Pacific Company, a cor-

poration duly organized and existing under and by virtue of the laws of the State of Kentucky.

Witnesseth: That whereas, the United States of America, as plaintiff, did on the fourth day of March 1876, commence proceedings in the Third District Court of the State of California, in the County of Alameda, against the Central Pacific Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, and other defendants, for the condemnation of certain lands and rights owned and claimed by said defendants and required by said plaintiff for the construction of a Tidal Canal, authorized by certain Acts of Congress making appropriations for the improvement of Oakland Harbor.

And Whereas, on the fourth day of November 1882, in the Superior Court of the County of Alameda, State of California, jurisdiction having been conferred thereon, a certain decree was filed in said cause condemning the lands and rights of said defendants, and especially condemning the lands and rights of the said Central Pacific railroad Company for the uses and purposes for which the same were sought, and which is more especially set out in the complaint therein and in said decree.

And Whereas, in said decree it was determined and adjudged as a condition to be kept and performed by the United States of America, that in the construction of said canal, the said United States should, at its own expense, construct and keep in repair for the said Central Pacific Railroad Company, certain railroad bridges across the same,

along the line of the present railroad crossing the said proposed canal that is to say, one along the line of said railroad on or adjoining Fruitvale Avenue, [57] and one along the line of said railroad on or adjoining Washington Avenue, which said last mentioned line is shown colored red on the annexed map and made part hereof.

And Whereas, the said Central Pacific Railway Company is the successor in interest of the said Central Pacific Railroad Company, and as such has succeeded to all the rights and privileges in and by virtue of said decree of Court,

And Whereas, The Southern Pacific Company, as the lessee, has or claims some interest in the decree aforesaid,

And Whereas, the abandonment of one of said bridges, to wit, the one on the line of said railroad on or adjoining Washington Avenue would be in the interest of commerce and navigation, and would relieve the said United States of great expense in constructing and keeping the same in repair.

Now Therefore, in consideration of the premises, and the sum of Fifty thousand ($50,000) dollars paid by the United States to the Central Pacific Railway Company, the receipt whereof is hereby acknowledged, the Central Pacific Railway Company and the Southern Pacific Company do hereby release, absolve and discharge, now and forever, both in law and in equity the said United States from the performance of the obligation and condition to construct the bridge along the said line of

railroad on or near Washington Avenue, and the United States is hereby released, absolved and discharged, now and forever, both in law and in equity, from the performance of the obligation and condition to construct the said proposed bridge along the said line of railroad on or near Washington Avenue, and accepts this agreement and payment as a full performance of said decree in reference to said last named bridge.

In Witness Whereof, the parties hereto, the United States by W. H. Heuer, Lieutenant Colonel, Corps of Engineers, U. S. A., duly authorized by law and the Secretary of War, the Central Pacific Railway Company by its [58] President and Secretary, duly authorized by resolution of its Board of Directors passed on the Thirty-first day of January 1901, and the Southern Pacific Company by its President and Secretary, duly authorized by resolution of its Board of Directors passed on the 7th day of March 1901, have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in presence of

G. KNIGHT WHITE.

W. H. HEUER,

[Seal] Lieutenant Colonel, Corps of Engineers, U. S. A.

CENTRAL PACIFIC
RAILWAY COMPANY

[Seal] By ISAAC S. REQUA,
President,

J. L. WILLCUTT,
Secretary,

SOUTHERN PACIFIC
COMPANY

[Seal] By CHAS. M. HAYS,
President,

I. E. GATES,
Secretary.

(Copies of resolutions and acknowledgments attached.) [59]

State of New York,
City and County of New York—ss.

On the 7th day of March in the year 1901, before me, Wm. Shillaber, a Commissioner of Deeds for the State of California in the State of New York, duly commissioned and sworn, personally appeared Isaac E. Gates, known to me to be the Secretary of the Southern Pacific Company, the corporation that executed the within instrument, and acknowledged to me that he executed the same as said Secretary.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the date and year last above written.

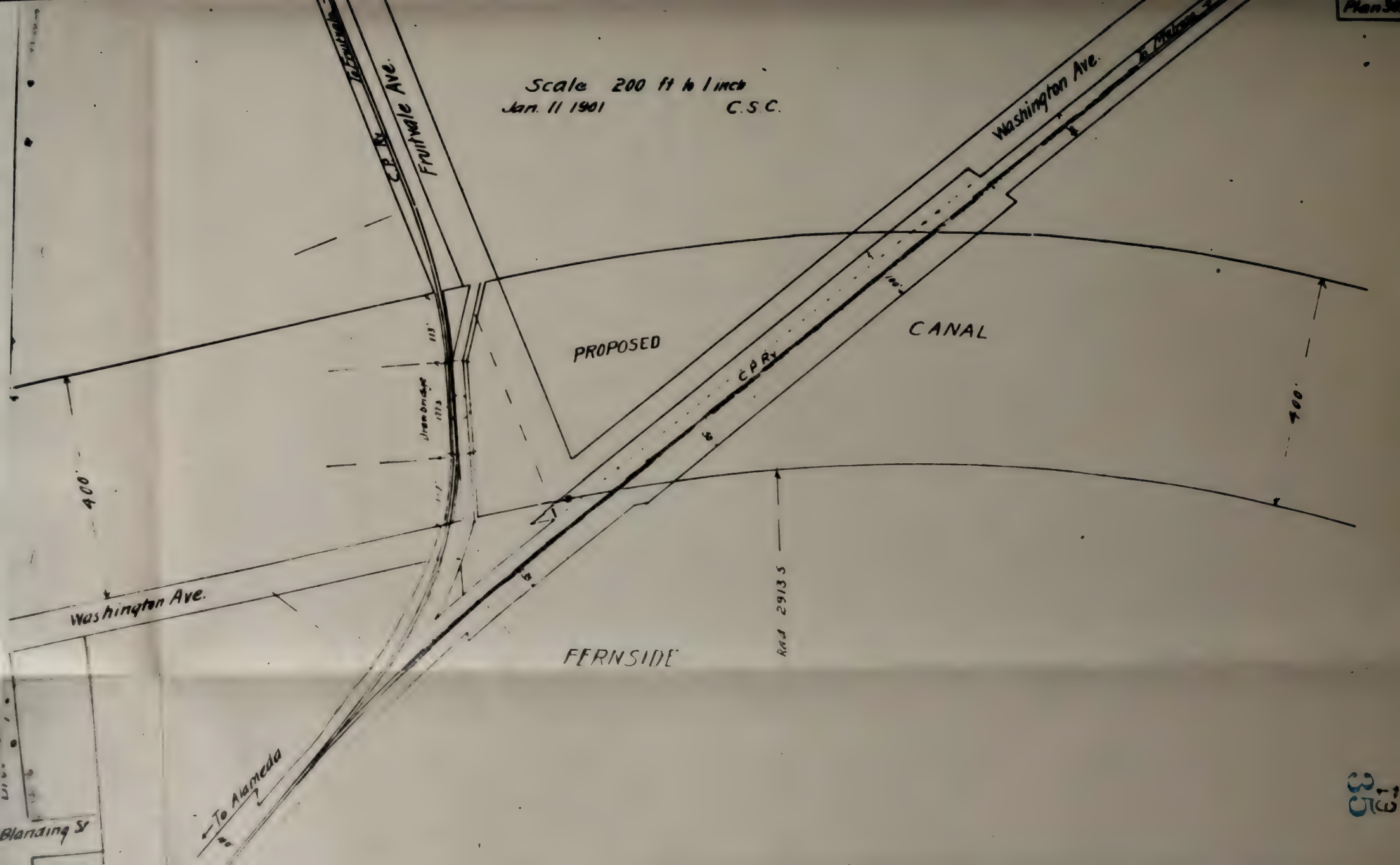
[Seal] WILLIAM SHILLABER,
Commissioner of Deeds for the State of California in New York.

State of California,
City and County of San Francisco—ss.

On this 14th day of March, A. D. 1901, before me E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Chas. M. Hays, known to me to be the President of the Southern Pacific Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that said corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] E. B. RYAN,
Notary Public, In and for the City and County of San Francisco, State of California. [60]


Scale 200 ft to 1 inch
Jan. 11 1901 C.S.C.
C.P.Ry.
Fruitvale Ave.
Washington Ave.
PROPOSED
CANAL
C.P.Ry.
400'
700'
Rad 2913 5
Washington Ave.
FERNSIDE
To Alameda
Blanding St

Resolved, That Charles M. Hays, President, and I. E. Gates, Secretary, of this Company, be and they are hereby authorized to execute on its behalf, and under its corporate seal, the agreement, draft of which has been submitted to this Board, between the United States of America, the Central Pacific Railway Company and the Southern Pacific Company, releasing the United States from the obligation and condition to construct the bridge across the tidal canal along the line of railroad of the Central Pacific Railway Company on or near Washington Avenue, in the City of Oakland, California, imposed by a decree of the Superior Court of the County of Alameda, State of California, November 4, 1882.

I, I. E. Gates, Secretary of the Southern Pacific Company, do hereby certify that the foregoing is a full, true and correct copy of a resolution adopted by the Board of Directors of said Company at a meeting thereof held in the office of the Company on the 7th day of March, 1901, as appears by the record of the proceedings of the Board of Directors of said Company in my custody as said Secretary.

In Witness Whereof, I hereunto set my hand and affix the corporate seal of said Southern Pacific Company this 7th day of March, A. D. 1901.

I. E. GATES,

Secretary. [62]

Central Pacific Railway Company

Copy of Resolution Adopted January 31st, 1901

Adopting agreement between the United States of America, the Central Pacific Railway Company, and the Southern Pacific Company, covering the relinquishment of right of way for a bridge across the tidal canal, Alameda County, California.

Resolved that the President and Secretary of this Company be and they are hereby authorized, empowered and directed to execute as the act and deed of the Company and under its Corporate Seal, an agreement with the United States in substantially the words and figures following, to-wit: [63]

This Agreement, made and entered into this .....day of.....A. D. 1901, between the United States of America The Central Pacific Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and the Southern Pacific Company, a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky.

Witnesseth: That whereas, the United States of America, as plaintiff, did on the fourth day of March 1876, commence proceedings in the Third District Court of the State of California, in the County of Alameda, against the Central Pacific Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, and other defendants, for the condemnation of certain lands and rights owned and

claimed by said defendants and required by said plaintiff for the construction of a Tidal Canal, authorized by certain Acts of Congress making appropriations for the improvement of Oakland Harbor.

And Whereas, on the fourth day of November 1882, in the Superior Court of the County of Alameda, State of California, jurisdiction having been conferred thereon, a certain decree was filed in said cause condemning the lands and rights of said defendants, and especially condemning the lands and rights of the said Central Pacific railroad Company for the uses and purposes for which the same were sought, and which is more especially set out in the complaint therein and in said decree.

And Whereas, in said decree it was determined and adjudged as a condition to be kept and performed by the United States of America, that in the construction of said canal, the said United States should, at its own expense, construct and keep in repair for the said Central Pacific Railroad Company, certain railroad bridges across the same, along the line of the present railroad crossing the said proposed canal that is to say, one along the line of said railroad on or adjoining Fruitvale Avenue, [64] and one along the line of said railroad on or adjoining Washington Avenue, which said last mentioned line is shown colored red on the annexed map and made part hereof.

And Whereas, the said Central Pacific Railway Company is the successor in interest of the said Central Pacific Railroad Company, and as such has

succeeded to all the rights and privileges in and by virtue of said decree of Court,

And Whereas, The Southern Pacific Company, as the lessee, has or claims some interest in the decree aforesaid,

And Whereas, the abandonment of one of said bridges, to wit, the one on the line of said railroad on or adjoining Washington Avenue would be in the interest of commerce and navigation, and would relieve the said United States of great expense in constructing and keeping the same in repair.

Now Therefore, in consideration of the premises, and the sum of Fifty thousand ($50,000) dollars paid by the United States to the Central Pacific Railway Company, the receipt whereof is hereby acknowledged, the Central Pacific Railway Company and the Southern Pacific Company do hereby release, absolve and discharge, now and forever, both in law and in equity the said United States from the performance of the obligation and condition to construct the bridge along the said line of railroad on or near Washington Avenue, and the United States is hereby released, absolved and discharged, now and forever, both in law and in equity, from the performance of the obligation and condition to construct the said proposed bridge along the said line of railroad on or near Washington Avenue, and accepts this agreement and payment as a full performance of said decree in reference to said last named bridge.

In Witness Whereof, the parties hereto, the United States by F. H. Heuer, Lieutenant Colonel, Corps of Engineers, U. S. A., duly authorized by law and the Secretary of War, the Central Pacific Railway Company by its [65] President and Secretary, duly authorized by resolution of its Board of Directors passed on the.....day of..... 1901, and the Southern Pacific Company by its President and Secretary, duly authorized by resolution of its Board of Directors passed on the..... day of.....1901, have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in presence of

.....

.....

Lieutenant Colonel, Corps of Engineers, U. S. A.

CENTRAL PACIFIC RAILWAY COMPANY

By .....

President

.....

Secretary

SOUTHERN PACIFIC COMPANY

By .....

President

.....

Secretary [66]

I, J. L. Willcutt, Secretary of the Central Pacific Railway Company, a corporation duly organized under the laws of the State of Utah, hereby certify that the foregoing is a full, true and correct copy of a resolution adopted by the Board of Directors of said Company, at a meeting of said Board held at the office of the Company in the City and County of San Francisco, State of California, on the 31st day of January, 1901, as the same appears on the Record of Proceedings of said Board in my custody as such Secretary.

Witness my hand and the corporate seal of said Company at San Francisco, California, the 31st day of January 1901.

[Seal] J. L. WILLCUTT,
Secretary, Central Pacific Railway Company. [67]

EXHIBIT III

RESOLUTION OF BOARD OF SUPERVISORS OF ALAMEDA COUNTY

December 6, 1909. [68]

Copy of 637. (Alameda Co. Oakland Tidal Cn. Fruitvale Ave.)—22/1

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA, ACCEPTING PARK STREET, FRUITVALE AVENUE AND HIGH STREET BRIDGES.

Whereas, there exists in the County of Alameda, State of California, over and across the United States Tidal Canal, certain draw bridges commonly known as the Park Street Bridge and Fruitvale Avenue Bridge, and the High Street Bridge, all of which bridges were constructed over said canal by, and belong to, and are the property of, the United States of America; and

Whereas, no provision has ever been made for the operation of said bridges by the United States Government; and

Whereas, that portion of said canal between said bridges has never been open to navigation; and

Whereas, the requirements of commerce and shipping would be materially benefited by the operation of said bridges, and the opening of said canal to navigation in such manner as to permit the passage of vessels in said canal; and

Whereas, Lieutenant Colonel John Biddle, U. S. A., in his report upon the improvement of rivers and harbors in the First San Francisco, California Districts, has recommended that the bridges hereinbefore referred to, to wit, the High Street Bridge, Fruitvale Avenue Bridge and the Park Street Bridge be turned over to the County of Alameda, provided that the County of Alameda thereafter assume all cost of repair, operation and replacement when necessary; and,

Whereas, the Honorable Joseph R. Knowland, Congressman from the Third District of California, has succeeded in securing the recommendation of the War Department that permission be given to turn these bridges over to the County of Alameda; and,

Whereas, the City of Alameda, acting by and through its regularly constituted authorities thereunto duly authorized, has agreed [69] to supply electric power for the operation of said bridges hereinabove referred to for the period of five years, without cost to the said County of Alameda, now, therefore,

Be It Resolved that the County of Alameda, by and through its Board of Supervisors thereunto duly authorized, hereby agrees to accept said bridges, to wit: The said Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge and to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and

repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges, and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the waterfront of the tidal canal and establish harbor lines so as to permit the construction of wharves and docks; and

Be It Further Resolved that a copy of this resolution be sent by this Board under seal of this Board to United States Senator George C. Perkins, Congressman Joseph R. Knowland, Lieutenant Colonel John Biddle, and to the City Clerk of the City of Alameda.

Passed and adopted by the following vote:

Ayes: Supervisors—Bridge, Foss, Mullins and Ch. Honrner—4.

Noes: Supervisors—None.

Absent: Supervisors—Kelley.

I hereby certify that the foregoing is a true and correct copy of a Resolution adopted by the Board of Supervisors of Alameda, Cal., Monday, December 6th, 1909.

JOHN P. COOK,
County Clerk and Ex-officio Clerk of the Board of Supervisors of Alameda County, Cal.

By H. M. WILSON,
Deputy Clerk. [70]

EXHIBIT IV

LICENSE [71]

Whereas, By the Act of Congress approved June 25, 1910, entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes" (Public—No. 264), and under the clause of appropriation therein for "Improving harbor at Oakland, California", it is provided, inter alia, as follows:

> "Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer";

Now, Therefore, Under the authority and discretion in him vested by the above-quoted provision of said Act of Congress, and in accordance with the recommendation of the Chief of Engineers, United States Army, the Secretary of War hereby grants

unto the Board of Supervisors of Alameda County, California, a License, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

This License is granted subject to the following conditions and provisions:

1. That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any one of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2. That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3. That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting

it in good order for operation under the new conditions.

4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5. That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic.

Witness my hand this ..... day of September, 1910.

[Illegible]

Assistant and Chief Clerk, For the Secretary of War, in his absence. [72]

EXHIBIT V.

RESOLUTION OF NOVEMBER 10, 1913, ACCEPTING LICENSE. [73]

RESOLUTION OF THE BOARD OF SUPERVISORS

OF THE COUNTY OF ALAMEDA.

Introduced by Supervisor_____

At meeting held Sept. 10 1913.

WHEREAS, this Board of Supervisors, by resolution heretofor adopted, agreed to accept certain draw bridges across the United States Tidal Canal in Alameda County, commonly known as the Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge, and assume all costs of future repair, operation and replacement of said bridges, provided that each of said bridges were placed in such condition and repair by the United States Government that said bridges, and each of them, might be operated by electricity, and that the United States should, under such terms and conditions as it might see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks; and

WHEREAS, subsequent to the adoption of said resolution, and on the 3rd day of September, 1910, the Secretary of War, in accordance with the provisions of an Act of Congress, approved June 25, 1910, entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes" (public No. 264), issued a license to the Board of Supervisors, revocable at will by the Secretary of War, to assume control of the said three bridges built by the United States in connection with the improvement of Oakland Harbor, California, which said license was granted subject to the following conditions and revisions, to-wit:

1. That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more ... lines or corporations shall desire to use the bridges, or any of them, each shall pay its proportional share of the ... cost and its share of maintenance of the track or tracks jointly used.

[illegible] for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3. That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5. That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic; and

WHEREAS, the United States has put all three bridges in condition for operation of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished bridge-tenders' houses and highway gates; and, also, overhauled all old machinery and put it in good order for operation, under the new conditions as required by paragraph 3 of said License, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

BE IT RESOLVED that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the said three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor, to-wit, the Park Street Bridge, the Fruitvale Avenue Bridge and the High Street Bridge, subject to the conditions and provisions of the aforesaid License of September 3, 1910, and assuming control from and after Monday, November 17th, 1913.

Adopted by the following vote:

AYES: Supervisors [illegible]

NOES: Supervisors None

ABSENT: Supervisors None.

75

I , John P. Cook, County Clerk, and ex officio Clerk of the Board of Supervisors of Alameda County, State of California , do hereby certify that the foregoing resolution hereunto attached is a true and correct copy of a resolution adopted by said Board of Supervisors of Alameda County , State of California, on Monday, November, 10, A. D. , 1913,

JOHN P. COOK,
County Clerk and ex-Officio Clerk
of the Board of Supervisors of
Alameda County, State of California

By. K. M. Wilson
Deputy Clerk.

EXHIBIT VI.

NOTICE OF SEPTEMBER 28, 1939. [77]

Copy of 6371 (Alameda Co.—Oakland Tidal Cn. —Fruitvale Ave.)—23

County of Alameda

September 28, 1939.

R. C. Hunter
Major, C. E.
District Engineer

In re: The Fruitvale Avenue Bridge and the decision in County of Alameda v. Ross, 97 Cal. App. D 166, petition for hearing denied by the Supreme Court of the State of California.

Dear Sir:

As stated in our letter addressed to J. A. Dorst, Lt. Col., C. E. on June 30, 1939, the above decision holds that the license agreement under which the County is operating the Fruitvale Avenue Bridge is void.

The Board of Supervisors of the County of Alameda has felt that the United States Government should be given a reasonable length of time within which to meet the situation created by this decision. In view of the above mentioned decision, the County cannot continue to operate the Fruitvale Avenue Bridge indefinitely. The Board of Supervisors has accordingly directed me to notify you

that at midnight, December 31, 1939, the County of Alameda will cease to operate said bridge.

Respectfully yours,

G. E. WADE,

County Clerk and Ex-Officio Clerk of the Board of Supervisors of the County of Alameda, State of California.

By J. C. HOLLAND,

Deputy. [78]

EXHIBIT VII.

NOTICE OF JULY 27, 1939. [79]

Copy of 6371 (Alameda Co.—Oakland Tidal Cn. —Fruitvale Ave.)—18/1

Southern Pacific Company
65 Market St., San Francisco

File: G-4179-2
July 27, 1939.

District Engineer,
U. S. War Department,
Custom House,
San Francisco, Calif.

Dear Sir:

The attention of your office has several times been called to the situation of the so-called Fruitvale

Avenue Drawbridge between Oakland and Alameda. I call your attention particularly to a formal notice under date of November 26, 1937, signed on behalf of the Central Pacific Railway Company and Southern Pacific Company delivered to your office on December 17, 1937.

We have recently been informed by representatives of the County of Alameda that the County will no longer maintain or operate the drawbridge referred to. This decision on the part of the County appears to be due in large part at least, to a decision of the District Court of Appeal, Third District of California, under date of April 12, 1939, in proceeding No. 6184—County of Alameda vs. Ross, to the effect that the license or agreement which purported to place this drawbridge under the jurisdiction of the County was void, at least so far as the County was concerned, and that the County could not lawfully expend moneys on the bridge.

The railroad portion of this drawbridge is an important artery of commerce, forming the only all-rail connection to the City of Alameda and it is essential that proper steps be taken to renew the bridge within a reasonable time. The Central Pacific Railway Company, successor to Central Pacific Railroad Company, and Southern Pacific Company, its lessee, therefore renew their demand that the U. S. Government comply with the decree in the case of the United States vs. Crooks, and others, being case No. 3590, which decree was entered November 4, 1882 and is on file in the office of the

County Clerk of Alameda County, Calif. Said decree provides, among other things:

> "* * * that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same * * * and also suitable railroad bridges on the present railroad tracks crossing the line of said canal." [80]

You are therefore again called upon to cause this drawbridge to be inspected, maintained and renewed so that the public service of said bridge will not be interrupted.

CENTRAL PACIFIC RAILWAY COMPANY
SOUTHERN PACIFIC COMPANY

By E. J. FOULDS
Their Attorney [81]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS, CENTRAL PACIFIC RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY.

Come now defendants, Central Pacific Railway Company and Southern Pacific Company, and as and for their Answer to the complaint in the above-entitled proceeding, admit, deny and allege as follows:

I.

Admit the allegations of paragraphs One (1), Two (2), Three (3) and Four (4) of said complaint. [82]

II.

Admit the allegations of paragraph Five (5) of said complaint, and with respect thereto allege that the railroad therein referred to as a party defendant in said condemnation suit of United States v. Crooks, et al, was the Central Pacific Railroad Company, a corporation, which corporation in the year 1899 transferred and conveyed all of its rights, properties and franchises to Central Pacific Railway Company, one of the defendants herein. By virtue of said transfer and conveyance, defendant, Central Pacific Railway Company, ever since has been and is the successor to and owner of all of the rights, properties and franchises so transferred and conveyed, including all of the rights accorded to said Central Pacific Railroad Company in and by the decree in the said condemnation suit and the successor of said Central Pacific Railroad Company in the ownership of the railroad and railroad facilities therein referred to, which railroad and railroad facilities are in possession of Southern Pacific Company, as lessee, and operated by it as a part of its railroad system for the transportation of persons and property, both in interstate and intrastate commerce, as a common carrier for hire.

III.

Admit the allegations of paragraphs Six (6), Seven (7), Eight (8), Nine (9), and Ten (10) of said complaint, except that with reference to the allegations of said paragraphs Nine (9) and Ten (10), these defendants allege that they were for many years, and until recently, without knowledge of the resolution alleged to have been adopted by the Board of Supervisors of Alameda County on December 6, 1909, or of the terms and conditions of any license issued by or agreement made by the Secretary of War relating to the control of said Fruitvale Avenue Bridge; nor have these defendants, or either of them, ever had, up to the time of filing of the complaint herein, any knowledge of any relinquishment, denial or repudiation of [83] the obligations of the United States with respect to said Bridge; and, so far as known to these defendants, there was no such relinquishment, denial or repudiation on the part of the United States up to the time of filing the complaint herein. Furthermore, neither of these defendants has, nor have they both, nor have their predecessors, or any of them, at any time, directly or indirectly, released the United States from any obligations with respect to said Bridge, or accepted any obligation of the County of Alameda with respect to said bridge, in lieu of the obligations of the United States or otherwise.

IV.

Admit the allegations of paragraphs Eleven (11) and Twelve (12) of said complaint, except that

these defendants allege that they had no knowledge of the license issued under date of September 3, 1910 by the Secretary of War, at the time it was issued, or for many years thereafter, and did not at any time take any action or change their position in any way by reason thereof, nor have they, directly or indirectly, released the United States from its obligations in the premises, or accepted any obligation of the County of Alameda in the place and stead of the obligations of the United States in the matter, or otherwise.

V.

Admit the allegations of paragraphs Thirteen (13), Fourteen (14), Fifteen (15) and Sixteen (16) of said complaint; and in this behalf allege that neither of these defendants was a party to the case of County of Alameda v. Ross, therein referred to, nor were any of the pleadings in said action ever served upon them, or either of them; and that by reason thereof neither of these defendants is directly or indirectly bound by the decision, decree or judgment in said case.

VI.

Admit the allegations of paragraphs Seventeen (17), Eighteen (18), Nineteen (19), Twenty (20) and Twenty-one (21) of said complaint, except that with reference to the allegations of [84] said paragraph Twenty-one (21), these defendants deny that the moneys expended by the United States in the maintenance, operation, repair and improvement of

the Fruitvale Avenue drawbridge, therein referred to, constituted just or any compensation for the lands and rights of these defendants, and their predecessors, taken by the United States, in the case of United States v. Crooks, et al, referred to in said complaint; that the United States has not paid to these defendants, or either of them, or their predecessors, just or any compensation for the taking of their rights at the site of said Fruitvale Avenue drawbridge; and that as between the plaintiff, United States, and these defendants, their respective rights and obligations have been adjudicated and decreed in said case of United States v. Crooks, and have not subsequently been altered, amended or modified in any way, in so far as said Fruitvale Avenue drawbridge is concerned.

And in this behalf, these defendants further allege that they are not directly or indirectly, nor is either of them, a party to the alleged agreement between the United States and the County of Alameda, set forth in said complaint, and hence by their insistence upon the performance by the United States of its obligations under the decree of court in said case of United States v. Crooks, either directly or indirectly, or through its successors, assigns or licensees, do not and cannot violate any agreement to which these defendants, or their predecessors, or any of them, were or are a party or parties.

VII.

And as for their affirmative defense, these defendants allege that for many years prior to the construction of said tidal canal or San Antonio Estuary in the location of the present Fruitvale Avenue drawbridge, Central Pacific Railroad Company, predecessor of defendant, Central Pacific Railway Company, was the owner of a strip of land fifty (50) feet wide, lying [85] equally on each side of the track of said Central Pacific Railroad Company, extending over what was then dry land between Oakland and Alameda, said strip of land being adjacent to the road or street then and still known as Fruitvale Avenue, said strip of land having been acquired by said Central Pacific Railroad Company by grant deed from Wm. H. Glasscock and others, under date of October 5, 1876, recorded October 20, 1876, in Liber 133 of Deeds, page 257, of the County Records of Alameda County, California, and constituted a fee owned right-of-way for said railroad line. Said railroad line between Oakland and Alameda was opened for common carrier railroad operation in December 1876, and ever since has been continuously operated by said Central Pacific Railroad Company, or its successor, Central Pacific Railway Company, and by Southern Pacific Company, as lessee, and by Interurban Electric Railway Company, under trackage rights.

That by virtue of the condemnation proceedings in the case of United States v. Crooks, et al, referred to in said complaint, and the decree of con-

demnation of said proceeding, the United States acquired, by eminent domain, the right to extend said tidal canal across said railroad right-of-way adjacent to Fruitvale Avenue and the railroad tracks and facilities thereon; that no compensation was awarded to these defendants, or their predecessors, or any of them, for such taking, but in lieu thereof, the said court, by its judgment and decree, imposed the obligation upon the United States to construct and keep in repair suitable bridges for the public highways and railroad tracks crossing the lines of said canal including the said track at or near Fruitvale Avenue; and no other compensation or consideration has been paid to these defendants or their predecessors, or any of them, for said taking; and, so far as known to these defendants, all moneys which have been expended by the United States and by the County of Alameda, its licensee, upon or with respect to said bridge at Fruitvale Avenue, have been so [86] expended in conformity with, and pursuant to, the obligations upon the United States under said decree in the case of United States v. Crooks, and not otherwise.

That the said Fruitvale Avenue drawbridge was thereafter constructed by the United States in accordance with said judgment and decree of court in the case of United States v. Crooks, et al, and a railroad track placed thereon in substitution for the railroad track connecting Oakland and Alameda, formerly over the right-of-way hereinabove

described. The operation of said railroad line has ever since continued over said bridge in lieu of the former tracks laid upon said railroad right-of-way in said location; said railroad line over said bridge now constitutes the only railroad track connection between the City of Alameda and the main land and constitutes part of an important artery of commerce, over which many thousand people and many carloads of freight are transported daily in regular railroad operation; that it is imperative that the track connection afforded by said drawbridge remain unimpaired and that the said bridge be maintained in good condition and repair, so as to support said track connection, in the interest of the safety and convenience of the traveling and shipping public using the same, and in the interest of these defendants.

These defendants allege that the duty to maintain said bridge or a suitable bridge at Fruitvale Avenue for the purposes aforesaid is imposed upon the United States by the decree of court in the case of United States v. Crooks, referred to in said complaint; that the United States has never been released by these defendants, or either of them, or by their predecessors, from the obligation so imposed upon it with reference to such bridge; and these defendants are entitled to require the performance by the United States, either directly or through its successors, assigns or licensees, including the County of Alameda, as such licensee, of the obligations imposed upon the United States by said decree of [87]

court in the case of United States v. Crooks; and that it is in the public interest, and in the interest of these defendants that this court reiterate and declare that the United States, its successors, assigns and licensees, including the County of Alameda as such licensee, are bound by said decree of court, and require them to conform therewith.

These defendants further allege that the public interest, as well as their interest, and rights in the premises, require that said Fruitvale Avenue drawbridge be kept open for traffic as it now is; that any disruption of rail traffic over said bridge would cause great and irreparable injury and damage to the public and to these defendants; and that in the event of any threatened interruption of the use of this bridge, this court should issue an appropriate injunctive order to prevent any such interruption.

Wherefore, defendants pray that this Court by its judgment and decree:

1. Declare that the decree of condemnation in the case of United States v. Crooks, et al, imposes a valid and subsisting obligation upon plaintiff, United States of America, either alone or jointly with the County of Alameda, as licensee of the United States, in favor of these defendants and their successors and assigns, with respect to the maintenance of a suitable bridge or bridges to carry the railroad line of these defendants, their successors and assigns, across the San Antonio Estuary where it intersects Fruitvale Avenue in the County of Alameda, State of California; and that the plain-

tiff, United States of America, either alone or jointly with its licensee, the County of Alameda, are under a valid, subsisting and continuing obligation to provide, maintain, operate and renew such bridge or bridges so long as the same may be necessary to carry the tracks of these defendants [88] across said Estuary in said location; and that these defendants are entitled to enforce such obligation.

2. Require plaintiff, United States of America, either alone or jointly with its licensee, the County of Alameda, to maintain, keep in repair, renew, and operate such bridge, and to take all steps and proceedings necessary or proper to fulfill said obligation.

3. Award these defendants their costs herein, and such other and further relief as may be just, meet and proper in the premises.

Dated: February 5th, 1940.

E. J. FOULDS

Attorney for Defendants, Southern Pacific Company and Central Pacific Railway Company.

[89]

State of California,
City and County of San Francisco—ss.

Jay D. Bacon, being duly sworn, deposes and says:

That he is Assistant Secretary of Central Pacific Railway Company and Assistant Secretary of Southern Pacific Company defendants in the foregoing action; that he has read said Answer and

knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

JAY D. BACON

Subscribed and sworn to before me this 5th day of February, 1940.

(Notarial Seal) FRANK HARVEY

Notary Public In and for the City and County of San Francisco, State of California.

Admission of Service

Service of the within answer is hereby admitted this 5 day of February, 1940.

RALPH E. HOYT,
District Attorney for Alameda County
By J. F. COOKLEY,
Chief Ass't
FRANK J. HENNESSY
U. S. Attorney
By W. E. LICKING
Ass't U. S. Atty

[Endorsed]: Filed Feb. 6, 1940. [90]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT.

Comes now the County of Alameda, a body corporate and politic, and a political subdivision of the State of California, one of the defendants above named, by its Attorney, Ralph E. Hoyt, District Attorney in and for said County, and answering the complaint for declaratory judgment on file herein admits, denies and alleges as follows:

I

Admits the allegations contained in Paragraphs 1, 2 and 3 hereof.

II

Admits the allegations contained in Paragraph 4 hereof except that this defendant denies that the Rivers and Harbors Act (18 Stat. 237, C. 457) was enacted in the year 1873 and in this connection alleges that the said Act was enacted in the year 1874. [92]

III

In reference to Paragraph 5 thereof, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations that the United States sought to condemn the right of the County in a highway which crossed the proposed Estuary Tidal Canal at Washington Avenue or that a bridge was then located at said Washington Avenue. Admits all of the remaining allegations contained in Paragraph 5 thereof.

III-A

Admits the allegations contained in Paragraph 6 of the complaint.

IV

With reference to Paragraph 7 of the complaint, defendant admits that the Central Pacific Railroad Company was a party defendant in said condemnation action. With reference to the other allegations in said Paragraph, defendant is without knowledge or information sufficient to form a belief as to the truth of said allegations.

IV-A

With reference to the allegations contained in Paragraph 8 of the complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

V

With reference to Paragraph 9 thereof, defendant admits that on December 6, 1909, the Board of Supervisors of Alameda County adopted a resolution, of which Exhibit III attached to the Complaint is a full and true copy, but denies that the County of Alameda agreed to assume any or all costs of future repairs, operation and replacement of said bridges.

VI

With reference to Paragraph 10 thereof, defendant admits that in the Rivers and Harbors Act, approved June 25, 1910 (36 Stat. 630, c. 382), under

the clause of appropriations therein for "Improving harbor at Oakland, California," it is provided, inter alia:

> "Provided Further: That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities. Provided Further: That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer." [93]

Admits that the United States installed electrical operating machinery on the Fruitvale Avenue, Park Street and High Street Bridges; deepened and dredged said tidal canal and opened it to navigation; and established harbor lines so that wharves and docks could be constructed as alleged therein.

Denies generally and specifically, each and every, all and singular, the remaining allegations contained therein, save and except the allegations that the total amount expended by the United States in this connection was five hundred thirteen thousand dollars ($513,000.00), and in this respect alleges

that defendant is without knowledge or information sufficient to form a belief as to this allegation.

VII.

With reference to Paragraph 11 thereof, defendant admits that on September 5, 1910, the Secretary of War issued an alleged license to the Board of Supervisors of Alameda County, concerning the operation and control of the said three bridges, which alleged license was revocable at will, and that Exhibit IV attached to said Complaint is a full, true and correct copy of said alleged license.

VIII.

With reference to Paragraph 12, defendant admits that on November 10, 1913, the Board of Supervisors of Alameda County adopted a resolution concerning the operation and control of said three bridges and that Exhibit V attached to said Complaint is a full, true and correct copy of said resolution.

Denies that Alameda County accepted said license, and in this conection alleges that the action of the Board of Supervisors in adopting the said resolution purporting to accept said license was beyond its authority, ineffective and void. [94]

IX.

With reference to Paragraph 13 of the Complaint, admits that thereafter the said County of Alameda, operated and kept said bridges in repair, and has replaced or rebuilt the bridge at Park

Street; but denies that said County is now engaged in constructing a new bridge at High Street, and in this connection alleges that said County has completed the construction of a new bridge at High Street; and further denies that either said Park Street Bridge or said High Street Bridge was constructed by the County of Alameda pursuant to said License Agreement; but in this connection alleges that the Park Street Bridge was constructed pursuant to the provisions of that certain Agreement duly made and entered into by and between the United States of America and the County of Alameda on the 28th day of November, 1933, a full and true copy of which Agreement is attached hereto, marked Exhibit I and made a part hereof; and further alleges that the High Street Bridge was constructed pursuant to the provisions of that certain Agreement duly made and entered into by and between the United States of America and the County of Alameda on the 2nd day of August, 1938, a full and true copy of which Agreement is attached hereto, marked Exhibit II and made a part hereof; and in this connection further alleges that in the construction of the Park Street Bridge the United States furnished approximately 30% of the cost thereof and the County has accordingly received the sum of Two Hundred Thirty-four Thousand Eight Hundred Nineteen Dollars and Seventy Cents ($234,819.70) from the United States in payment of the total cost of the construction of the Park Street Bridge and further alleges that in

the construction of the High Street Bridge the United States has undertaken to furnish approximately 45% of the cost thereof, and the County has accordingly received the sum of Two Hundred Fifty-six Thousand Two [95] Hundred Dollars ($256,200.00) from the United States in payment of a part of said portion of the total cost of the construction of the High Street Bridge, and the County has requisitioned the balance of said portion due from the United States in the sum of Seventy-three Thousand Two Hundred Dollars ($73,200.00).

X.

Admits the allegations contained in Paragraph 14 thereof.

XI.

Denies the allegations contained in Paragraph 15 thereof that under the supposed authority of a decision, dated April 12, 1939, of the District Court of the Third Appellate District of the State of California, in a cause entitled County of Alameda (a body Corporate and Politic and a Political Subdivision of the State of California) v. Horace P. Ross, as Auditor of the County of Alameda, Civil No. 6184 (97 Cal. App. 166), said county notified the United States on September 28, 1939, that at midnight, December 31, 1939, said County would cease to operate said Fruitvale Avenue Bridge, but in this connection alleges that on June 1, 1939, the Supreme Court of the State of California denied an application by Petitioner for hearing by said

Supreme Court of a decision dated April 12, 1939, of the District Court of the Third Appellate District of the State of California in an action entitled "County of Alameda, a Body Corporate and Politic and a Political Subdivision of the State of California, Petitioner, v. Horace P. Ross, as Auditor of the County of Alameda, State of California, Respondent," 32 Cal. App. (2nd) 135, 89 Pac. (2nd) 460, a full and true copy of which latter decision as set forth in said California Appellate Reports is attached hereto, marked Exhibit III and made a part hereof, in which decision the alleged license agreement between the United [96] States and the County of Alameda under which the County was operating the Fruitvale Avenue Bridge was held to be void, and admits that, in view of this decision and said order of the Supreme Court of the State of California, said County notified the United States on September 28, 1939, that at midnight, December 31, 1939, the County would cease to operate said Fruitvale Avenue Bridge.

Admits the allegations contained in Paragraph 15 thereof that a full and true copy of said notice is attached to Plaintiff's complaint and marked Exhibit VI.

Denies the allegations contained in Paragraph 15 thereof that said County has since agreed to operate said bridge until March 31, 1940, but in this connection alleges that the Board of Supervisors of said County has extended the time during which the County will operate the Fruitvale Avenue

Bridge for a period of ninety (90) days from December 31, 1939.

Admits the allegations contained in Paragraph 15 thereof that by continuing to operate said bridge for a period of ninety (90) days from December 31, 1939, the County of Alameda has waived no rights it may have in the premises.

XII.

Admits the allegations contained in Paragraph 16 thereof that neither the United States nor any of its officers was a party to said action referred to in the preceding paragraph hereof, but denies that none of the pleadings in said action were ever served upon the United States or any of its officers, and denies that the United States never had an opportunity to appear in said action, and in this connection alleges that on December 8, 1938, prior to the hearing of said action, the attorney for Petitioner in said action deposited in the United States mail, postage prepaid, addressed to the office of the United States District Attorney, [97] Post Office Building, San Francisco, California, copies of the following in said action: (1) Petition for Writ of Mandate filed in the Supreme Court of the State of California; (2) Petitioner's Points and Authorities on application for Writ of Mandate; (3) Alternative Writ of Mandate; and (4) Order of the Supreme Court transferring action to the District Court of Appeal of the Third Appellate District, and a full and true copy of the letter of transmittal is attached hereto,

marked Exhibit IV and made a part hereof; that on January 3, 1939, prior to the hearing of said action, the attorney for Respondent in said Action deposited in the United States mail, postage prepaid, addressed to said office of said United States Attorney, a copy of Respondent's Answer to Petition for Writ of Mandate and a copy of his Points and Authorities in support thereof, in said action, together with a letter of transmittal advising said office of said United States Attorney as to when and where the matter would be submitted on briefs, and a full and true copy of the letter of transmittal is attached hereto, marked Exhibit V and made a part hereof; and that on January 3, 1939, prior to the hearing of said action, the attorney for Petitioner in said action deposited in the United States mail, postage prepaid, addressed to said office of said United States Attorney, a copy of the Agreed Statement of Facts, a copy of Petitioner's Reply to Respondent's Answer, a copy of Points and Authorities thereof and a copy of a stipulation to submit the matter on briefs, in said action, together with a letter of transmittal advising said office of said United States Attorney as to when and where the matter would be submitted on briefs, and a full and true copy of the letter of transmittal is attached hereto, marked Exhibit VI, and made a part hereof.

XIII.

With reference to the allegations contained in Paragraph [98] 17 of the Complaint that the Cen-

tral Pacific Railway Company and the Southern Pacific Company served a notice upon the United States on July 27, 1939 that the United States "comply with the decree in the case of United States v. Crooks and others, . . . and that a full and true copy of said notice is attached to plaintiff's complaint marked Exhibit VII, the defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of said allegations.

The defendant denies each and every, all and singular the remaining allegations in said Paragraph 17 of the complaint.

XIV.

Denies each and every, all and singular the allegations contained in Paragraph 18 thereof and in this connection alleges that the District Court of Appeal of the State of California, in and for the Third Appellate District, had the jurisdiction and power in said decision of County of Alameda, etc., vs. Ross, etc., referred to in Paragraph IX herein, (Exhibit III), to find and determine that said alleged license agreement which the United States and the Board of Supervisors of Alameda County purported to enter into, was void under both the Constitution and the Statutes of the State of California, as well as void under other designated and well established principles of law, and in this connection further alleges that the Supreme Court of the State of California, on June 1, 1939, denied pe-

titioner's application to have the cause heard in said Supreme Court after said judgment in said District Court of Appeal.

XV.

Denies each and every, all and singular the allegations contained in Paragraph 19 hereof, and in this connection alleges that the District Court of Appeal of the State of Cali- [99] fornia, in and for the Third Appellate District, in said action entitled County of Alameda, etc., vs. Ross, etc., did not determine that the Secretary of War improperly or illegally exercised a discretion granted to him by Congress in the issuance of said License dated September 3, 1910.

XVI.

With reference to the allegations contained in Paragraph 20 of the Complaint the defendant denies generally each and every, all and singular, the allegations contained therein and in this connection the defendant specifically denies that the resolution of the Board of Supervisors of Alameda County dated December 6, 1909 constituted an offer by the County of Alameda, and defendant further denies that the United States in consideration of the said alleged offer expended the sum of Five Hundred Thirteen Thousand Dollars ($513,000.00) or any other sum in the installation of electrical operating machinery on each of said bridges and/or deepened and dredged said tidal canal so that it could be

opened to navigation and/or established harbor lines and defendant alleges that in doing each and all of said things the United States did nothing more than it was already bound and obligated to do. Defendant further denies that said county has had the benefit of said work since November 17, 1913 or any other date and/or that said County is now estopped to question the validity of the alleged agreement alleged to have been constituted by the alleged offer of Alameda County to accept the burden of maintenance, operation and repair of said Fruitvale Avenue Bridge, the alleged acceptance of said alleged offer by the Secretary of War and the alleged ratification of the same by said County; defendant further denies that the County of Alameda ratified the alleged acceptance of the said Secretary of War and defendant further denies that there is [100] now or ever has been any agreement on the part of the County of Alameda to accept the burden of maintenance, operation and repair of said Fruitvale Avenue Bridge.

XVII.

Answering Paragraph 21 of the Complaint defendant admits the allegation that the United States operated, maintained and kept in repair the bridge at Fruitvale Avenue from 1901 until November 17, 1913. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in Paragraph 21 of said complaint that the sum of Five Hundred

Thirteen Thousand Dollars ($513,000.00) or any other sum was expended by the United States in installing electrical operating machinery on said bridge and/or in deepening the channel of said tidal canal and/or establishing harbor lines between December 6, 1909 and November 17, 1913. Defendant specifically denies that the County of Alameda on December 6th, 1909, or at any other time made an offer to operate, maintain and repair said bridges and defendant further denies that said County on November 17, 1913 or at any other time accepted the alleged license, allegedly issued by the Secretary of War; and defendant denies that there now is or at any time has been an agreement between the County of Alameda and the United States that said County will operate, maintain and repair said bridge; and defendant generally and specifically denies each and every all and singular the other allegations contained in said paragraph of said complaint.

XVIII.

And that for affirmative defenses the defendant County of Alameda alleges that:

The City of Oakland and the City of Alameda are situated upon the east shore of San Francisco Bay, a navigable [101] body of water; that both cities are located within the County of Alameda, State of California, and are separated from each other by a navigable body of water known at various times and in various quarters by the following names: San Antonio Estuary, Oakland Estuary,

Oakland Harbor, Inner Harbor, Tidal Canal and/or Alameda Estuary; that that portion of said body of water extending from San Francisco Bay to the eastern end of Brooklyn Basin was, and at all times herein and in said complaint mentioned was, a navigable body of water; that said body of water at all times herein and in the complaint mentioned was and is an arm of San Francisco Bay; that, pursuant to the powers and duties of the government of the United States "to regulate commerce with foreign nations and among the several States" (U. S. Const. Art. I, Sec. 8) and various laws of the United States from time to time enacted by Congress pertaining to the regulation of navigable waters within the United States and to the improvement of rivers and harbors of the United States and more particularly pursuant to the laws of the United States by Congress enacted with reference to the improvement of Oakland Harbor and said estuary and the regulation of commerce and traffic thereon, plaintiff assumed control of said body of water in connection with the regulation of commerce and traffic thereon and upon San Francisco Bay and undertook to improve said estuary; that, because of constantly accumulating sediment upon the bottom of said estuary between its mouth on the west and its eastern end in said Brooklyn Basin, the United States deemed it necessary to dig and dredge a tidal canal from said eastern end of Brooklyn Basin to said San Leandro Bay as described in the complaint; that this work was done

as an aid to navigation and for the purpose of increasing the tidal flow in said estuary between San Leandro Bay and San Francisco Bay [102] and by the scouring effect or action of said tidal flow keep the channel of the said estuary free from deposit or sediment.

That, in connection with the said project of constructing or digging said tidal canal, the United States brought in the District Court of the Third Judicial District in and for the State of California, now the Superior Court of the State of California in and for the County of Alameda, a condemnation action entitled "United States, plaintiff, vs. Crooks, County of Alameda, Central Pacific Railroad Company, et al., defendants, Action No. 3590"; that said action was brought for the purpose of condemning and obtaining the land upon which to construct or dig said tidal canal between the said Brooklyn Basin and San Leandro Bay; that, prior to and at the time said action of United States vs. Crooks, et al. was begun, the County of Alameda owned and maintained public roads upon the land sought by plaintiff in said condemnation action; that the defendant, Central Pacific Railroad Company, predecessors, and/or assignors and/or lessors of the defendants, Central Pacific Railway Company and Southern Pacific Company, owned and maintained rights of way and tracks in connection with the operation of trains across said strip of land sought by plaintiff in said action.

That by virtue of the condemnation proceedings in the case of United States v. Crooks, et al, referred to in said complaint, and the decree of condemnation of said proceeding, the United States acquired, by eminent domain, the right to extend said tidal canal across said public roads and highways owned and operated by the said County of Alameda and across said railroad right of way adjacent to Fruitvale Avenue and the railroad tracks and facilities thereon; that no compensation was awarded to these defendants, or their predecessors, or any of them, for such taking, [103] but in lieu thereof, the said court, by its judgment and decree, imposed the obligation upon the United States to construct and keep in repair suitable bridges for the public highways and raliroad tracks crossing the lines of said canal including the said track at or near Fruitvale Avenue; and no other compensation or consideration has been paid to this defendant for said taking; and, so far as known to this defendant, all moneys which have been expended by the United States upon or with respect to said Bridge at Fruitvale Avenue, have been so exepended in conformity with, and pursuant to, the obligations imposed upon the United States under said decree in the case of United States v. Crooks, and the laws of the United States.

The County of Alameda asked for no damages in said condemnation suit and in the judgment in said action the Court provided as follows:

"Defendants, the County of Alameda, The Central Pacific Railroad Company, Charles Meinicke and S. A. Smith, not having claimed damages, no damages are awarded to them.

"It is further ordered, adjudged and decreed that in the construction of said canal the plantiff at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the line of said canal."

That, pursuant to said decree in said condemnation action and pursuant to the powers and duties of the United States government to regulate commerce with foreign nations and among the several states and to regulate commerce upon navigable waters of the United States and by virtue of the laws of the United States from time to time enacted by Congress and more particularly by virtue of the laws of the United States enacted by Congress with reference to the control and regulation of commerce upon the navigable waters of Oakland Harbor and said estuary and the [104] improvement thereof, the United States did dig, dredge and construct said tidal canal and did build and construct the Park Street Bridge, the High Street Bridge and the Fruitvale Avenue Bridge across said tidal canal; and in building and constructing the said bridges the United States constructed them as drawbridges

and, particularly with reference to the Fruitvale Avenue Bridge, installed in connection with the drawbridge portion of said bridge hand operating machinery; that for many years thereafter the United States maintained and operated said Fruitvale Avenue Bridge; that, subsequent to the said construction of said Fruitvale Avenue Bridge and said installation of hand operating machinery, the population of the cities of Oakland and Alameda increased, and commerce and business, both inter-state and with foreign countries, as well as intra-state, increased in said cities; that traffic connected with inter-state and foreign commerce increased upon the waters described in Paragraph 3 of the complaint, and traffic upon the bridges spanning said body of water likewise increased; as a result of said increase in commerce and traffic the said bridges, and particularly the hand operating machinery on said Fruitvale Avenue Bridge, became obsolete, unsuitable and inadequate.

Because of said increased traffic conditions and commerce upon the said bridges and upon the said estuary, and in order to comply with the duties imposed upon plaintiff by the laws of the United States in connection with the regulation, control and aid of navigation and because of the provisions of the decree in the case of United States v. Crooks, et al., requiring plaintiff at its own expense to construct and keep in repair suitable bridges across said estuary, it became necessary to install electrical

operating equipment and machinery upon the said Fruitvale Avenue Bridge. [105]

That some time prior to November, 1913, said electrical operating machinery was installed upon said Fruitvale Avenue Bridge by plaintiff.

That at some time subsequent to the condemnation by plaintiff of the said strip of land described by the decree in the case of United States v. Crooks, et al., and before November, 1913, plaintiff dredged and deepened the said tidal canal, opened it for navigation and established harbor lines thereon.

That in dredging and deepening the said tidal canal, opening to navigation, establishing harbor lines, and installing electrical operating machinery upon the Park Street, High Street and Fruitvale Avenue Bridges, plaintiff did nothing more than what it was already bound and obligated to do under the laws of the United States and the decree in the said case of United States v. Crooks, et al., hereinabove mentioned.

That on December 6, 1909, the Board of Supervisors of Alameda County adopted a resolution concerning the future repair, operation and replacement of said bridges, a copy of which resolution is marked Exhibit III and attached to the complaint in this action.

That on June 25, 1910, the Congress of the United States passed a law with reference to the improvement of Oakland Harbor, to-wit, Rivers and Harbors Act approved June 25, 1910, (36 U. S. Statutes 630, C. 382) which provided inter alia that the three

bridges, to-wit, Park Street, High Street and Fruitvale Avenue, might be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities, and that subsequent to said enactment the Secretary of War issued "unto the [106] Board of Supervisors of Alameda County a license, revocable at will by the Secretary of War" to assume control of the three bridges subject to certain conditions and provisions. That a full, true and correct copy of said license is attached to the complaint marked Exhibit IV.

That on November 10, 1913, the Board of Supervisors of Alameda County adopted a resolution concerning said license, a copy of which said resolution is attached to the complaint in this action and marked Exhibit V.

That subsequent to November, 1913, the Board of Supervisors of Alameda County operated, maintained and kept in repair the said Fruitvale Avenue Bridge.

That the action of the said Board of Supervisors of Alameda County in adopting the resolution of December 6, 1909, was beyond and without the scope of authority and powers of said Board of Supervisors and did not bind the defendant County of Alameda to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge.

That the said license hereinabove mentioned did not bind or obligate the defendant County of Alameda to operate, maintain or repair or rebuild the said Fruitvale Avenue Bridge.

That the resolution of November 10, 1913, adopted by the Board of Supervisors of Alameda County hereinabove mentioned was beyond and without the scope of authority and powers of said Board of Supervisors and did not bind the defendant County of Alameda.

That at all times herein and in the complaint in this action mentioned, the said resolutions of December 6, 1909, and November 10, 1913, were ineffective, illegal, void and not binding upon the defendant County of Alameda. [107]

That said action of said Board of Supervisors adopting said resolution was not the action of the defendant County of Alameda and neither said resolution or either of them constituted an offer by the defendant County of Alameda to assume all costs of future repair, operation and replacement of said bridges.

That neither the said resolution of the Board of Supervisors of December 6, 1909, nor the said license hereinabove referred to, nor the said resolution of the Board of Supervisors of November 10, 1913, constituted an offer and/or an accepance of a contract to or by either the United States or the County of Alameda and that neither individually nor together did said resolution or action of the Board of Supervisors and/or of the Secretary of

War constitute a valid or a binding contract between the Board of Supervisors of Alameda County and the United States or between the defendant County of Alameda and the United States.

That the operation, maintenance, repair and/or rebuilding of the said Fruitvale Avenue Bridge by the Board of Supervisors was and is illegal and beyond, without and contrary to the authority and powers of said Board of Supervisors.

That said operation, maintenance, repair and/or rebuilding of said bridge in no way bound the said Board of Supervisors or the defendant County of Alameda to continue the operation, maintenance, repair of said Fruitvale Avenue Bridge or to rebuild said bridge.

That the Board of Supervisors of the County of Alameda does not and did not have the power, either expressed or implied, to legally make expenditures for the operation, maintenance, repair and/or rebuilding of said bridge or to obligate the said County of Alameda to operate, maintain, repair and/or rebuild the same. [108]

That any agreement to operate, maintain, repair and/or rebuild said bridge by the County of Alameda is and was prohibited by Section 31 of Article IV of the Constitution of the State of California prohibiting a county from making a gift of any public money or thing of value to any individual, municipal or other corporation.

That any agreement by the County of Alameda to operate, maintain, repair and/or rebuild the

said Fruitvale Avenue Bridge is and was prohibited by Section 18 of Article XI of the Constitution of the State of California, prohibiting the County from incurring any indebtedness or liability in any manner or for any purpose exceeding in any one year the income and revenue provided for such year for said county. [109]

XIX.

That the Complaint fails to state a claim or cause of action against defendant, County of Alameda, upon which the relief prayed for can be granted.

Wherefore, defendant, County of Alameda, prays:

1. That this court deny each and every, all and singular the things, requested in the prayer of plaintiff's Complaint, save and except that contained in paragraph 7 of the said prayer and in this connection defendant, County of Alameda prays that all of the rights, obligations and liabilities of each and all of the parties to this action in the premises, and more particularly with reference to the control, operation, maintenance, repair and rebuilding of said Fruitvale Avenue bridge be defined, declared and adjudicated in this action.

2. That this court order, adjudge and decree that the plaintiff herein is bound and obligated to operate, maintain, repair and when necessary to rebuild or replace said Fruitvale Avenue bridge.

3. That this court order, direct and enjoin plaintiff to assume control, operation, maintenance and repair of said Fruitvale Avenue bridge on or before March 31, 1940. [110]

COUNTERCLAIM

In the event of any doubt or question whether under Section 274d of the United States Judicial Code or of other laws of the United States this Court has power to declare rights and other legal relations of any interested party other than the party petitioning or filing the complaint, defendant County of Alameda by and through Ralph E. Hoyt, District Attorney in and for the County of Alameda, hereby affirms, alleges, claims and avers by way of counterclaim in the above entitled action as follows, to-wit:

I

Adopts, reaffirms, realleges, restates and by reference incorporates each and every, all and singular, the paragraphs, allegations, statements and contents of the Answer hereinabove set forth.

Wherefore, defendant and counterclaimant prays:

1. That this Court define, declare and adjudicate all rights, obligations and liabilities of each and all of the parties to this action in the premises and that more particularly with reference to the control, operation, maintenance, repair and rebuilding of said Fruitvale Avenue Bridge, said rights, obligations and liabilities of each and all of the parties to this action be defined, declared and adjudicated.

2. That this Court order, adjudge and decree that the United States is bound and obligated to operate, maintain, repair and, when necessary, to rebuild or replace said Fruitvale Avenue Bridge.

3. That this Court order, direct and enjoin the United States to assume control, operation, main-

tenance and repair of said Fruitvale Avenue Bridge on or before the 1st day of March, 1940.

4. That this Court order, adjudge and decree that there never [111] was any valid, binding contract or agreement between the United States and defendant County of Alameda or between the United States and the Board of Supervisors of the County of Alameda, whereby the defendant County of Alameda or the Board of Supervisors of the County of Alameda was bound to operate, maintain, repair and/or rebuild the said Fruitvale Avenue Bridge.

5. That this Court order, adjudge and decree that the defendant County of Alameda and/or the Board of Supervisors of the County of Alameda be now and forever relieved, released and absolved of any obligation, liability, duty or responsibility in connection with the control, operation, maintenance, repair and/or rebuilding of the said Fruitvale Avenue Bridge.

Dated: February 7, 1940.

RALPH E. HOYT,
District Attorney of the County of Alameda, State of California,
By J. F. COAKLEY,
Chief Assistant District Attorney of the County of Alameda, State of California.
Attorney for Defendant County of Alameda.

[112]

EXHIBIT I.

Copy of Agreement Made and Entered Into By and Between the United States of America and the County of Alameda, Dated the 24th Day of October, 1933, Concerning the Construction of the Park Street Bridge. [113]

Agreement

This Agreement, made and entered into by and between the United States of America, acting by and through the Secretary of War, duly authorized, hereinafter designated as the first party, and the County of Alameda, State of California, acting by and through its Board of Supervisors, who are duly authorized, hereinafter designated as the second party, Witnesseth:

Whereas, by a decree of the District Court of the Third District of California (now known as the Superior Court of the State of California in and for the County of Alameda) rendered under date of September 30, 1882, the right of way for the Oakland Harbor Tidal Canal, California, a navigable waterway of the United States, was condemned, it was, inter alia, ordered, adjudged and decreed that in the construction of said Canal the plaintiff, the United States and first party herein, at its own expense construct and keep in repair suitable bridges across the Canal on all the roads then used as public highways crossing the line of said Canal, and also suitable railroad bridges on the then existing railroad tracts crossing the line of said Canal;

And, Whereas, thereafter, and in compliance with the above mentioned decree the first party con-

structed and maintained three bridges over and across said Canal;

And, Whereas, by Act of Congress approved June 25, 1910 (36 Stat. 630, 661), which included an appropriation for the further improvement of the harbor at Oakland, California, it was provided, inter alia, that the three bridges theretofore built by the United States in connection with that improvement may be turned over to the local authorities, to be maintained and operated by [114] them upon such terms as to transfer and control as in the discretion of the Secretary of War may be deemed equitable and just to the United States and to said local authorities;

And Whereas, by Act approved January 21, 1927 (44 Stat. 1010, 1014), Congress adopted a modification of the existing project for the improvement of Oakland Harbor, California, in accordance with and subject to the conditions set forth in House Document No. 407, 69th Congress, 1st Session, said conditions providing, inter alia, that local interests should alter or replace the bridges over the Tidal Canal, when, in the opinion of the Secretary of War, such alteration or replacement was deemed necessary in the interest of navigation and thereafter operate and maintain them;

And Whereas, under dates of April 11 and 13, 1931, the Acting Chief of Engineers and The Assistant Secretary of War, respectively, approved plans and map of location of a bridge proposed to be built by the second party at the site of and to replace the existing bridge at Park Street, one of

the three bridges over the Tidal Canal built by the first party as aforesaid;

Now, Therefore, in consideration of the premises and the mutual benefits resulting to the parties therefrom, the first party hereby transfers to the second party all its right, title and interest in and to the existing Park Street Bridge over and across the Tidal Canal in Alameda, California, being one of the three bridges built across said waterway pursuant to the aforesaid decree of the court, provided always that this transfer is made subject to the following covenants, to-wit:

1. That the second party at its own cost and expense will alter or replace the existing bridge and any bridge hereafter built over and across the Tidal Canal at Park Street, Alameda, California, to the satisfaction of the Chief of Engineers and the Secretary of War, when in the opinion of the Secretary of War such alteration or replacement may be necessary to permit improvement of the [115] channel or to render navigation in the Tidal Canal through and over such bridge reasonably free, easy and unobstructed.

2. That in the case of any bridge that may hereafter be built over and across the Tidal Canal at Park Street, Alameda, California, the ownership thereof shall be in the second party hereto.

3. That the second party will bear all costs and expenses incident to the future maintenance, operation and replacement of said bridge

or any bridge hereafter built at said location, and will forever save the first party harmless of all claims and liabilities that may arise by virtue of the responsibility and obligation of the first party under the above mentioned decree of the court to construct, maintain, operate and keep in repair a bridge at said location.

In Witness Whereof, the first party has caused this instrument to be signed by Geo. H. Dern, Secretary of War, and the official seal of the War Department to be hereunto affixed this 28th day of November, 1933, and the second party has caused its name to be signed and its official seal to be affixed hereto by the Chairman of the Board of Supervisors of the County of Alameda, State of California, this 24th day of October, 1933.

UNITED STATES OF AMERICA,

[Seal] By GEO. H. DERN,
Secretary of War.

COUNTY OF ALAMEDA

[Seal] By WM. J. HAMILTON,
Chairman of the Board of Supervisors of the County of Alameda, State of California.

(U. S. Engineer Office, Pacific Division, Oct. 30, 1933. San Francisco, Cal.) [116]

EXHIBIT II.

COPY OF AGREEMENT MADE AND ENTERED INTO BY AND BETWEEN THE UNITED STATES OF AMERICA AND THE COUNTY OF ALAMEDA, DATED THE 2ND DAY OF AUGUST, 1938, CONCERNING THE CONSTRUCTION OF THE HIGH STREET BRIDGE. [117]

Agreement

This agreement, made and entered into by and between the United States of America, acting by and through the Secretary of War, duly authorized, hereinafter designated as the first party, and the County of Alameda, State of California, acting by and through its Board of Supervisors, who are duly authorized, hereinafter designated as the second party, Witnesseth:

Whereas, by a decree of the District Court of the Third District of California (now known as the Superior Court of the State of California in and for the County of Alameda) rendered under date of September 30, 1882, the right of way for the Oakland Harbor Tidal Canal, California, a navigable waterway of the United States, was condemned, it was inter alia, ordered, adjudged and decreed that in the construction of said Canal the plaintiff, the United States and first party herein, at its own expense construct and keep in repair suitable bridges across the Canal on all the roads then used as public highways crossing the line of said Canal,

and also suitable railroad bridges on the then existing railroad tracks crossing the line of said Canal;

And whereas, thereafter, and in compliance with the above mentioned decree the first party constructed and maintained three bridges over and across said Canal;

And whereas, by Act of Congress approved June 25, 1910 (36 Stat. 630, 661), which included an appropriation for the further improvement of the harbor at Oakland, California, it was provided, inter alia, that the three bridges theretofore built by the United States in connection with that improve- [118] ment may be turned over to the local authorities, to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be deemed equitable and just to the United States and to said local authorities;

And whereas, by Act approved January 21, 1927 (44 Stat. 1010, 1014), Congress adopted a modification of the existing project for the improvement of Oakland Harbor, California, in accordance with and subject to the conditions set forth in House Document No. 407, 69th Congress, 1st Session, said conditions providing, inter alia, that local interests should alter or replace the bridges over the Tidal Canal, when, in the opinion of the Secretary of War, such alteration or replacement was deemed necessary in the interest of navigation and thereafter operate and maintain them;

And whereas, under dates of September 27 and

30, 1935, the Acting Chief of Engineers and The Acting Secretary of War, respectively, approved plans and map of location of a bridge proposed to be built by the second party at the site of and to replace the existing bridge at High Street, one of the three bridges over the Tidal Canal built by the first party as aforesaid;

Now, therefore, in consideration of the premises and the mutual benefits resulting to the parties therefrom the first party hereby transfers to the second party all its right, title and interest in and to the existing High Street Bridge over and across the Tidal Canal in Alameda, California, being one of the three bridges built across said waterway pursuant to the aforesaid decree of the court, provided always that this transfer is made subject to the following covenants, to-wit: [119]

1. That the second party at its own cost and expense will alter or replace the existing bridge and any bridge hereafter built over and across the Tidal Canal at High Street, Alameda, California, to the satisfaction of the Chief of Engineers and the Secretary of War, when in the opinion of the Secretary of War such alteration or replacement may be necessary to permit improvement of the channel or to render navigation in the Tidal Canal through and over such bridge reasonably free, easy and unobstructed.

2. That in the case of any bridge that may hereafter be built over and across the Tidal Canal at High Street, Alameda, California, the

ownership thereof shall be in the second party hereto.

3. That the second party will bear all costs and expenses incident to the future maintenance, operation and replacement of said bridge or any bridge hereafter built at said location, and will forever save the first party harmless of all claims and liabilities that may arise by virtue of the responsibility and obligation of the first party under the above-mentioned decree of the court to construct, maintain, operate and keep in repair a bridge at said location.

In witness whereof the first party has caused this instrument to be signed by Louis Johnson, Acting Secretary of War, and the official seal of the War Department to be hereunto affixed this 2d day of August, 1938, and the second party has caused its name to be signed and its official seal to be affixed hereto by the Chairman of the Board of Supervisors of the County of Alameda, State of California, this 30th day of June, 1938.

[Seal] UNITED STATES OF AMERICA

By LOUIS JOHNSON
Acting Secretary of War.

COUNTY OF ALAMEDA

[Seal] By WM. J. HAMILTON
Chairman of the Board of Supervisors of the County of Alameda, State of California. [120]

EXHIBIT III.

COUNTY OF ALAMEDA, a Body Corporate and Politic and a Political Subdivision of the State of California, Petioner,

vs.

HORACE P. ROSS, as Auditor of the County of Alameda, State of California, Respondent, 32 Cal. App. (2d) 135; 89 Pac. (2d) 460, (As contained in said California Appellate Reports.) [121]

"(1) Counties — Bridges — Contracts—Licenses —Revocation—Mutuality—Consideration. — Where a license, such as that from the federal government to the County of Alameda authorizing the latter to use and operate three certain bridges across the Oakland estuary, is subject to the control of the Secretary of War and is revocable at will, either with or without cause, such license lacks mutuality of obligations and consideration, which renders it void, and such licensee is not authorized to incur indebtedness or to expend public moneys in repairing or maintaining the portion of one of the bridges which is used exclusively for the benefit of a railroad company.

"(2) Id.—Licenses — Improvements — Revocation.—Under certain circumstances a license which is ordinarily revocable at will may become irrevocable by the licensor, when the licensee, acting in

good faith under the terms of the instrument, constructs valuable improvements on the property, making it unjust to permit the cancellation without first compensating the licensee for his loss and expenditure of money, but that principle has no application where the specific terms of the license contemplate payment by the licensee for maintenance, repairs and reconstruction of bridges with the absolute right of revocation in spite of such expenditures.

"(3) Id.—Contracts—Private Benefits—Illegal Contributions.—The board of supervisors of Alameda County had no power to bind the county to a contract which bound it to pay for maintenance and improvements for the sole benefit of a private railroad corporation, and to maintain, repair and construct the Oakland estuary bridges with full knowledge that upon completion thereof the contract was subject to immediate revocation, and such contract was void for lack of mutuality and consideration, and it constituted an illegal contribution of public funds for the benefit of a private railroad corporation.

"(4) Id.—Revocable Licenses—Vested Rights—Easements.—Where the document, by the terms of which the federal government authorized the operation and use by the County of Alameda of the three Oakland estuary bridges, was revocable at the pleasure of the Secretary of War, at any time and with or without cause, a mere conditional license or privilege was created, and the use of the word 'grant' did

not have the effect of creating any vested interest or easement in the bridges which would include an interest in real property.

"(5) Id.—Contracts — Certainty — Mutuality—Consideration.—Agreements are void which contain indefinite and uncertain provisions with respect to the obligations and for lack of mutuality, and consideration, particularly when they contain an absolute and unconditional right of revocation by either party. [122]

"(6) Id.—Licenses—Consideration—Prior Expenditures.—Where the document giving to the County of Alameda the right to operate and use the three Oakland estuary bridges was lacking in mutuality, and it was uncertain and revocable at will, rendering the county liable for the expenditure of large sums of public money for the sole benefit of a private railroad corporation with no assurance of retaining the privilege of operating and using the bridges for a single day, there was no merit in the contention that the installation of electrical apparatus by the federal government for the opening and closing of the draw-bridges, under the terms of the license prior to its execution, furnished an independent consideration which made the agreement binding.

"(7) Id.—Corporate Powers—Agents—Notice—Indebtedness — Statutory Construction. — The County of Alameda is a body corporate and politic, possessing only such powers as are specifically granted to it by law, together with such other

powers as may be necessarily implied therefrom, and any person contracting with a county or municipal corporation is bound to recognize such limitations of power; and a board of supervisors is merely the agent of the county, and its powers with respect to incurring municipal indebtedness should be determined by a strict construction of the law.

"(8) Id.—Public Funds—Gifts—Constitutional Law.—The board of supervisors of Alameda County has no authority to incur indebtedness or expend public funds for the sole benefit of a private railroad corporation, and the payment of such an indebtedness is in the nature of a gift or free contribution to the corporation, and is illegal and void.

"Proceedings in Mandamus to compel the Auditor of Alameda County to issue a warrant in payment of materials for bridge repairs. Writ denied.

"The facts are stated in the opinion of the court.

"Earl Warren, District Attorney, Ralph E. Hoyt, Chief Assistant District Attorney, and James H. Oakley and Robert H. McCreary, Deputies District Attorney, for Petitioner.

"John R. Ober for Respondent.

"Thompson, J.—The petitioner seeks by means of a writ of mandamus to compel the respondent to issue a warrant in payment for materials ordered by the board of supervisors of Alameda County with which to repair a part of the Fruitvale Avenue bridge across the Oakland estuary, which portion of the bridge is used exclusively for the benefit of the Southern Pacific Railroad Company. [123]

"The respondent contends there is no valid contract or legal authorization for the County of Alameda to incur or pay the indebtedness for maintaining or repairing that portion of the bridge which is used exclusively for the benefit of a private corporation for the reason that such expenditures constitute a gift of money from the county which is prohibited by law, and because the license or agreement from the United States for the County of Alameda to use and maintain the bridge is specifically revocable at will and is therefore invalid for lack of mutuality of obligations and is void for lack of consideration.

"This proceeding is presented to this court on a written stipulation of facts.

"The cities of Oakland and Alameda are both located in Alameda County adjacent to the eastern shore of San Francisco Bay. These cities are separated by a navigable inlet and canal some seven miles in length commonly termed the Oakland estuary. This body of water extends inland from Oakland harbor connecting with Brooklyn basin, which contains docking facilities. A canal unites the lower extremity of Brooklyn basin with the upper point of San Leandro Bay, which is an arm of San Francisco Bay situated a few miles southeasterly from Oakland harbor. This tidal canal, which connects Brooklyn basin with San Leandro Bay, was dredged by the United States Government to permit passage of vessels from San Leandro Bay to the inner harbor. It is two miles in length and about three hun-

dred feet in width. The entire estuary, including the canal, is navigable for large vessels.

"In 1882 the United States condemned three rights of way across this canal between Oakland and Alameda for the construction and maintenance of the Fruitvale Avenue, High and Park Street bridges. The County of Alameda, the Central Pacific Railroad Company and certain individuals were named as parties defendant in that action. [124] None of the defendants asked for damages. The decree provided that:

"'It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair SUITABLE BRIDGES ACROSS THE SAME on all the roads now used as public highways crossing the line of said canal and also SUITABLE RAILROAD BRIDGES on the present railroad tracks crossing the line of said canal.'

"In 1901 the government constructed the Fruitvale Avenue bridge and the other two bridges across the estuary, each of which it maintained and operated until 1913. September 3, 1910, the Secretary of War issued to the board of supervisors of Alameda County, pursuant to an act of Congress authorizing 'appropriations for the construction, repair and preservation of certain public works on rivers and harbors' (36 U. S. Stat. 630,661), the revocable license to maintain and operate the three bridges, which license is the subject of controversy in this proceeding. That document reads in part:

"'"Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, that of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer;"

"'Now Therefore, Under the authority and discretion in him vested by the above-quoted provision of said Act of Congress, and in accordance with the recommendation of the Chief of Engineers, United States Army, the Secretary of War hereby grants unto the [125] Board of Supervisors of Alameda County, California, a License, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

"'This License is granted subject to the following conditions and provisions:

"'1.—That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall

desire to use the bridges, or any one of them, each shall bear its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

" '2.—That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

" '3.—That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tender houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

" '4.—That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

" '5.—That said Board of Supervisors shall maintain the necessary number of bridge tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic.' [126]

"November 19, 1913, the board of supervisors of Alameda County adopted a resolution accepting the license according to the terms expressed therein,

and thereafter repaired and operated the three bridges. The Fruitvale Avenue bridge is a combination swinging span supported by a single central concrete pier which may be opened for the passing of vessels. A portion of that bridge is used exclusively for the tracks of the Southern Pacific Railroad Company. The remaining portion of the bridge is used for vehicles and pedestrians. These two portions of the bridge are separated by an open steel partition. the traffic over that bridge has so increased with the growth of population that an average of more than 4,000 vehicles crossed it daily in 1937. During that year the bridge was opened six times a day to permit vessels to pass to and from the inner harbor.

"The bridges require expenditures of large sums of money to repair and operate them. It is conceded the Fruitvale Avenue bridge now requires the expenditure of considerable money for immediate repairs and that it will soon be necessary to replace it at an estimated cost of approximately $1,250,000. For necessary immediate repairs of the railroad portion of the Fruitvale Avenue bridge, for the sole use and benefit of the tracks of the railroad company, the board of supervisors authorized the purchase of iron bolts and materials of comparatively small value, which were furnished and delivered. A claim for the agreed price of said materials was presented, approved and allowed by the board of supervisors pursuant to section 4076 of the Political Code. Upon presentation of that claim the county

auditor refused payment on the ground that it is illegal and based on a void contract which he is not authorized to pay. Thereupon this petition for a writ of mandamus was filed to compel the auditor to draw his warrant in payment of the claim.

"The claim which is involved in this proceeding is relatively small, but the issues of this case are of great public interest [127] since the County of Alameda soon will be compelled to replace the Fruitvale Avenue bridge at a cost in excess of a million and a quarter dollars with a possibility of losing the entire sum of money by an immediate revocation of the license.

"The respondent asserts that the claim is illegal and that the County of Alameda is not authorized to incur indebtedness to repair or rebuild, at least that portion of the Fruitvale Avenue bridge which is used exclusively for the benefit of a private railway corporation, because the license is revocable at will by the Secretary of War, which renders it void, and the expenditure of public funds under such circumstances is in the nature of a gift which is prohibited by article IV, section 31, of the Constitution of California.

"(1) We are of the opinion the license from the United States does not authorize the County of Alameda to incur indebtedness or to expend public money in repairing or maintaining that portion of the Fruitvale Avenue bridge which is used exclusively for the benefit of the Southern Pacific Railroad Company, for the reason that the license is

revocable at will by the Secretary of War and therefore lacks mutuality of obligations and consideration, which renders it void, and because the particular indebtedness which is involved in this proceeding constitutes a gift of public funds to a private corporation in conflict with article IV, section 31, of the Constitution of California.

"The license in question is an executory agreement authorizing the County of Alameda to retain the use and operation of the estuary bridges for an indefinite length of time, subject, however, to the control of the Secretary of War, and absolutely revocable at his will without cause therefor. It is apparent from the terms of the license that the County of Alameda will soon be called upon to reconstruct the Fruitvale Avenue bridge at an expense of [128] approximately $1,250,000, immediately upon the completion of which the government may revoke the agreement appropriate the benefits of the vast expenditure of money by the county, and resume its exclusive operation and control of the bridges. Under the uniform authorities such an agreement is held to be void for lack of mutuality of obligations and for lack of consideration.

"(2) Under certain circumstances a license which is ordinarily revocable at will may become irrevocable by the licensor, when the licensee, acting in good faith under the terms of the instrument, constructs valuable improvements on the property, making it unjust to permit the cancellation without first fully compensating the licensee for his loss and

expenditure of money. (2 Tiffany on Real Property, 2d ed., p. 1206, sec. 349 (d).) But that principle has no application to the present circumstances. The specific terms of this license contemplates payment by the County of Alameda for maintenance, repairs and reconstruction of the bridges with the absolute right of revocation in spite of such expenditures. The county was not deceived into believing it could acquire vested unrevocable rights in the bridges by incurring such expenditures. (3) The language of the license clearly requires the county to pay for maintenance and improvements for the sole benefit of a private railroad corporation, and to maintain, repair and reconstruct the bridges with full knowledge that upon completion thereof the contract is subject to immediate revocation. The board of supervisors had no power to bind the county to such an illegal contract. It is absolutely void for lack of mutuality and consideration. It also constitutes an illegal contribution of public funds for the benefit of a private corporation.

"(4) The document, by the terms of which the government authorizes the operation and use of the bridges by the County of Alameda, appears to be a mere conditional license or privilege to [129] use the bridges for the convenience of public traffic, which is revocable at the pleasure of the Secretary of War at any time with or without cause. In spite of the use of the term 'grant' which is employed in the instrument it seems clear that the government carefully refrained from conveying an easement in

the bridges which would include an interest in real property. The instrument provides that:

" 'The three bridges...may be TURNED OVER to the local authorities TO BE MAINTAINED AND OPERATED BY THEM UPON SUCH TERMS AS TO TRANSFER AND CONTROL AS IN THE DISCRETION OF THE SECRETARY OF WAR MAY BE EQUITABLE AND JUST to the United States and to said local authorities . . .

" '. . . The Secretary of War hereby grants unto the Board of Supervisors of Alameda County, California, A LICENSE REVOCABLE AT WILL BY THE SECRETARY OF WAR, to assume control of the said three (3) bridges . . .

" 'This License is granted subject to the following conditions and provisions:

" '1.—That the three bridges shall be freely open to all public traffic without charge, . . .

" '2.—. . . Said three bridges shall be under the supervision of the Engineer Officer of the United States Army, . . .

* * * * *

" '4.—The said Board of Supervisors shall maintain these bridges, attending to all necessary repairs and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.'

"Among the burdens or servitudes imposed upon land which may be conveyed, although not attached to land, are rights of way (Sec. 802, Civ. Code.) We

may assume that the right or privilege to use the bridges, under the circumstances of this case, constitutes [130] a license and not an easement which is attached to the land. Ordinarily, an easement is a permanent interest in the realty, while a license, at least so long as it is executory, may be revoked at pleasure. (1 Thompson on Real Property, p. 362, sec. 282; Davis v. Tway, 16 Ariz. 566 (147 Pac. 750, L. R. A. 1915E, 604); Eastman v. Piper, 68 Cal. App. 554 (229 Pac. 1002).)

"A right of way is primarily a privilege to pass over another's land. It does not exist as a natural right, but must be created by a grant or by its equivalent. Such rights of way may be either public or private. (2 Tiffany on Real Property, p. 1249, sec. 358.) A license may be revoked either by express words to that effect, or by the acts and conduct of the licensor. (2 Tiffany on Real Property, p. 1218, sec. 349 (d) and (e).) It is clear that the language employed in the license for the County of Alameda to use the bridges for public traffic, expressly reserves the right in the government to revoke that privilege at will, with or without cause. It therefore conveys to the County of Alameda no vested right to retain the operation and use of the bridges for any specific time notwithstanding the fact that the county has expended large sums of money in maintaining, improving and repairing the bridges. It may also suffer tremendous loss by incurring indebtedness for that purpose in the immediate future. (2 Tiffany on Real Property, pp.

1212, 1213.) Although the county may expend $1,-250,000 in rebuilding the Fruitvale Avenue bridge, it would thereby acquire no vested interest in that bridge which may not be forfeited at any moment by the exercise of the express reservation contained in the license to revoke it at the will of the government.

The instrument in question is in the nature of a promise or agreement on the part of the government to permit the County of Alameda to operate and use the bridges for public traffic. Since it contains an express provision that it may be revoked at will, [131] it creates no vested interest in the County of Alameda, and therefore lacks mutuality of obligations and also lacks consideration necessary to render it binding. In 1 Williston on Contracts, revised edition, page 123, section 43, it is said:

"'One of the commonest kind of promises too indefinite for legal enforcement is where the promissor retains an unlimited right to decide later the nature or extent of his performance. This unlimited choice in effect destroys the promise and makes it merely illusory. . . .

"' . . . A promise to give anything whatever which the promissor may choose, or to do or give something whenever the promissor pleases, is illusory, for such promises would be satisfied by giving something so infinitely near nothing or by performance so infinitely postponed as to have no calculable value. FOR THE SAME REASON IF

ONE PARTY TO AN AGREEMENT RESERVES AN UNQUALIFIED RIGHT TO CANCEL THE BARGAIN NO LEGAL RIGHTS CAN ARISE FROM IT WHILE IT REMAINS EXECUTORY.'

"Likewise, it is said in 1 Williston on Contracts that when one of the parties reserves the unqualified right to cancel the agreement at will it fails for lack of consideration. That text, page 352, section 104, reads:

" 'In any case where a promise in terms or in effect provides that the promissor has a right to choose one of two alternatives, and by choosing one will escape without suffering a detriment or giving the other party a benefit, the promise in insufficient consideration. THE SAME CONSEQUENCES FOLLOW WHERE A BILATERAL AGREEMENT IN QUESTION EXPRESSLY RESERVES TO ONE PARTY THE RIGHT OF IMMEDIATE CANCELLATION AT ANY TIME.'

On page 365, section 105, of the last cited authority it is further said:

" 'That a promise which in terms reserves the option of [132] performance to the promissor is insufficient to support a counter-promise is well settled. And the promise is no more effectual because the condition contained in it is in the form a condition subsequent rather than a condition precedent. As has been seen an agreement which one party reserves the right to cancel at his pleasure cannot create a contract.

" 'Since the courts, however, do not favor arbitrary cancellation clauses, the tendency is to interpret even a slight restriction on the exercise of the right of cancellation as constituting such legal detriment as will satisfy the requirement of sufficient consideration; for example, where the reservation of right to cancel IS FOR CAUSE, or by written notice, or after a definite period of notice, or upon the occurrence of some extrinsic event, or other objective standard.'

"Mutuality of obligations is an essential element in every binding contract. In the present case there is an absolute absence of mutuality for the reason that the government may cancel the agreement and deprive the County of Alameda of the use or control of the bridges at any moment without cause. In 13 Corpus Juris, page 337, section 188, it is said:

" 'Where one party reserves an absolute right to cancel or terminate the contract at any time mutuality is absent . . . It has been held that a contract which provides that it may be cancelled by either party is invalid for lack of mutuality, although the provision for cancellation is limited by an agreement that it shall be "for just cause", there being no means furnished for determining what may have been the particular cause or causes thereby intended by both parties.'

"There is not the slightest intimation in the license which is involved in this proceeding that the government reserves the right to revoke the use and operation of the bridges only for [133] 'good

cause'. A careful reading of the document leaves no doubt it was the intention of the government, clearly expressed in unequivocal language, that it reserves the absolute right to revoke the license at will with or without cause. It contains no limitation whatever upon that arbitrary power. It is therefore void for lack of mutuality and for lack of consideration.

"(5) It has been frequently held that agreements are void which contain indefinite and uncertain provisions with respect to the obligations and for lack of mutuality, and consideration, particularly when they contain an absolute and unconditional right of revocation by either party. (Hamlin v. Barnhart, 26 Cal. App. 632 (147 Pac. 1188); Charles Brown & Sons vs. White Lunch Co., 92 Cal. App. 457 (268 Pac. 490); Shortell vs. Evans-Ferguson Corp., 98 Cal. App. 650 (277 Pac. 519); Naify vs. Pacific Indemnity Co., 11 Cal. (2d) 5 (76 Pac. (2d) 663, 115 A. L. R. 476); Motor Car Supply Co. v. General Household Utilities Co., 80 Fed. (2d) 167; Miami Coca-Cola Bottling Co. v. Orange Crush Co., 296 Fed. 693; Ellis v. Dodge Bros., 237 Fed. 860; City of Pocatello v. Fidelity & Deposit Co. of Maryland, 267 Fed. 181; Console Master Speaker Corp. v. Muskegon Wood Products Corp., 3 W. W. Harr. (Del.) 390 (138 Atl. 598); Du Ponte De Nemours & Co. v. Claiborne-Reno Co., 64 Fed. (2d) 224, 232 (89 A. L. R. 238).)

"(6) There is no merit in the petitioner's contention that the installation of electrical apparatus

by the government for the opening and closing of the draw-bridges, under the terms of the license prior to its execution, furnishes an independent consideration which makes the agreement binding. It still lacks mutuality. It is uncertain and revocable at will, rendering the county liable for the expenditure of large sums of public money for the sole benefit of a private corporation with no assurance of retaining the privilege of operating and using the bridges for a single day.

"(7) The County of Alameda is a body corporate and [134] politic, possessing only such powers as are specifically granted to it by law, together with such other powers as may be necessarily implied therefrom. (Sec. 4000, Pol. Code.) Any person contracting with a county or municipal corporation is bound to recognize such limitations of power. (Hurst v. City of Burlingame, 207 Cal. 134 (277 Pac. 308); City and County of San Francisco v. Boyle, 195 Cal. 426 (233 Pac. 965); Ellis Landing & Dock Co. v. City of Richmond, 70 Cal. App. 720 (234 Pac. 336); Frisbee v. O'Connor, 119 Cal. App. 601 (7 Pac. (2d) 316); 18 Cal. Jur. 797, sec. 105; 1 McQuillin's Municipal Corp., 2d ed., p. 909, sec. 367.) Boards of supervisors are merely the agents of the county. (Sec. 4001, Pol. Code; Contra Costa County v. Soto, 138 Cal. 57 (70 Pac. 1019); County of Modoc v. Spencer, 103 Cal. 498 (37 Pac. 483).) The powers of a board of supervisors with respect to incurring municipal indebtedness should be determined by a strict construction of the law.

(Hurst v. City of Burlingame, supra; Egan v. San Francisco, 165 Cal. 576 (133 Pac. 294, Ann. Cas. 1915A, 754).) Quoting with approval from Linden v. Case, 46 Cal. 171, it is said in County of Modoc v. Spencer, supra, at page 502:

"'It is settled in this state that no order made by a board of supervisors is valid or binding unless it is authorized by law. No claim against a county can be allowed, unless it be legally chargeable to the county; and if claims not legally chargeable to the county are allowed, neither the allowance nor the warrants drawn therefor create any legal liability.'

"Section 4005 of the Political Code provides that:

"'All contracts, authorizations, allowances, payments, and liabilities to pay, made or attempted to be made in violation of law, shall be absolutely void, and shall never be the foundation or basis of a claim against the treasury of such county. And all officers of said county are charged with notice of the condition of the [135] treasury of said county, and the extent of the claims against the same.'

"(8) The board of supervisors of Alameda County had no authority to incur indebtedness or expend public funds for the sole benefit of the Southern Pacific Railroad Company, a private corporation. It appears that the materials which are involved in this proceeding are solely for the improvement and benefit of the Southern Pacific Rail-

road Company tracks across the bridge. The payment of the indebtedness which is here involved is in the nature of a gift or free contribution to the corporation, and it is, therefore, illegal and void. (Art. IV, sec. 31, Const. of Cal.; County of Los Angeles v. Jessup, 11 Cal. (2d) 273 (78 Pac. (2d) 1131); Goodall v. Brite, 11 Cal. App. (2d) 540 (54 Pac. 2d) 510); First Nat. Bank of Orland v. Ball, 90 Cal. App. 709 (266 Pac. 604); Powell v. Phelan, 138 Cal. 271 (71 Pac. 335).) In Higgins v. San Diego Water Co., 118 Cal. 524 (45 Pac. 824, 50 Pac. 670), it was held that a contract by a municipal corporation to pay public funds to a corporation or to an individual for the construction of a railroad is violative of article IV, section 31, of the Constitution and, therefore, void.

"The respondent also asserts that the indebtedness which is based on the agreement or license which may obligate the County of Alameda to expend $1,250,000 to rebuild the Fruitvale Avenue bridge in the near future is in conflict with the provisions of article XI, section 18, of the Constitution of California, for the reason that it would incur an indebtedness exceeding the limited revenues provided by law for a single current year. It has been definitely determined, as it is said in Arthur v. City of Petaluma, 175 Cal. 216 (165 Pac. 698), that the preceding constitutional provision means:

" 'Not only that an indebtedness incurred contrary to its express provisions was absolutely void, but that "each year's income [136] and revenue

must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year".'

"But the stipulated facts (paragraph XXV) show that the indebtedness directly involved in this proceeding does not exceed the cash balance which has been appropriated and now remains to the credit of the Fruitvale Avenue bridge fund. The issues presented in this proceeding do not necessarily include a determination as to whether an expenditure of money for the reconstruction of the bridge would exceed the revenue available for that purpose in that particular year and therefore be violative of the constitutional provision last mentioned. Accordingly, we refrain from deciding that question.

"For the reasons that the agreement or license lacks mutuality of obligations of the respective parties, that it lacks valid consideration because it is revocable at will, by the government, without cause, and that the claim involved constitutes an illegal appropriation of public funds for the sole benefit of a private corporation, it is void.

"The peremptory writ of mandamus is denied.

"Tuttle, J., and Pullen, P. J., concurred.

"An application by petitioner to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on June 1, 1939." [137]

EXHIBIT IV.

Copy of Letter Dated December 8, 1938, Addressed to Office of United States District Attorney by Attorney for Petitioner in County of Alameda vs. Ross. [138]

December 8th, 1938

W. E. Licking, Esq.,
Assistant U. S. District Attorney
Post Office Building,
San Francisco, California.

In re: County of Alameda
vs. Horace P. Ross

Dear Bill:

Pursuant to your recent telephone conversation with James Oakley, of this office, please find enclosed herewith copies of the following in the above entitled matter:

1. Petition for Writ of Mandate;
2. Petitioner's Points and Authorities on Application for Writ of Mandate;
3. Alternative Writ of Mandate; and
4. Order transferring action to the District Court of Appeal of the Third Appellate District.

Very truly yours,
EARL WARREN
District Attorney
By ROBERT H. McCREARY
Deputy

RHMcC:CA
Encls. [139]

EXHIBIT V.

Copy of Letter Dated January 3, 1939, Addressed to Office of United States District Attorney by Attorney for Respondent in County of Alameda vs. Ross. [140]

January 3, 1939

W. E. Licking, Esq.,
Assistant United States Attorney,
Post Office Building,
San Francisco, California.

Dear Sir:

Ralph E. Hoyt, District Attorney of the County of Alameda, has requested me as Attorney for Horace P. Ross, respondent in the matter of the County of Alameda v. Horace P. Ross, as Auditor of the County of Alameda, to send you the enclosed Respondent's Answer to Petition for Writ of Mandate and his Points and Authorities in support thereof.

The above entitled matter will be submitted on briefs in the District Court of Appeal of the State of California, in and for the Third Appellate District on January 4, 1939.

Very sincerely yours,
JOHN R. OBER

JRO:AC [141]

EXHIBIT VI

Copy of Letter Dated January 3, 1939, Addressed to Office of United States District Attorney by Attorney for Petitioner in County of Alameda vs. Ross. [142]

January 3, 1939.

Wm. E. Licking, Esq.,
Assistant United States Attorney,
Post Office Building,
San Francisco, California.

Dear Sir:

Please find enclosed the Agreed Statement of Facts and Petitioner's Reply to Respondent's Answer and Points and Authorities, and Stipulation to submit on briefs filed in the proceeding entitled County of Alameda vs. Horace P. Ross, as Auditor of the County of Alameda.

The above matter will be submitted on briefs in the District Court of Appeal of the State of California, in and for the Third Appellate District at Sacramento on January 4, 1939.

Very sincerely yours,
RALPH E. HOYT,
District Attorney.
By ROBERT H. McCREARY,
Deputy.

RHM:AC
Enclosures

Service of the within answer and counterclaim by copy admitted this 7th day of February, 1940.

W. E. LICKING,
Ass't U. S. Attorney,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 7, 1940. [143]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 21st day of March, in the year of our Lord one thousand nine hundred and forty.

Present: the Honorable Harold Louderback, District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, ETC.

This case came on regularly this day for trial before the Court. Brice Tool, Esq., Special Assistant to the Attorney General, and Wm. E. Licking, Esq., Assistant United States Attorney, were pres-

ent for and on behalf of the United States. J. F. Coakley, Esq., and Robert H. McCreary, Esq., appearing as attorneys for the County of Alameda, and E. J. Foulds, Esq., appearing as attorney for the Southern Pacific Co., and Central Pacific Ry. Co. Mr. Tool gave a statement of the case to the Court. Henry S. Pound was sworn and each testified on behalf of the United States. Plaintiff introduced into evidence exhibits marked Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12. Ordered the further trial of this case continued to March 22nd, 1940. [144]

[Title of District Court and Cause.]

AGREED STATEMENT OF FACTS

It Is Hereby Stipulated by and between the parties hereto by their respective attorneys that the following facts are true and that the cause of action may be submitted to and be decided by the Court, after written memoranda followed by oral argument, upon the facts hereinafter set forth and the exhibits hereto attached which are expressly made a part of this Agreed Statement of Facts, and such other evidence as may by either party be offered and by the Court admitted in the case. With the exception of the relief prayed for, this stipulation completely supersedes and is exclusive of the pleadings filed by the parties to this action.

I.

This is a suit of a civil nature brought by the United States to enforce certain alleged duties of

the defendant, County of Alameda, [147] claimed to arise out of certain facts, proceedings, records and documents hereinafter set forth as to the correct interpretation and legal effect of which there is an actual, existing controversy between the parties hereto, and the Court is requested by plaintiff and defendants to declare the rights, duties and obligations of the parties therein, and to decree performance accordingly.

II.

The County of Alameda was at all times herein mentioned, and now is a body corporate and politic, and a political subdivision of the State of California. The Central Pacific Railway Company, and the Southern Pacific Company are private corporations, duly authorized and licensed to do business within the State of California, and are engaged in the business of operating railroad lines within and without said State and are the owners of, or claim some interest in, certain railway rights of way within the said County of Alameda in or over the Tidal Canal described hereafter, and more particularly in, over and upon the Fruitvale Avenue Bridge hereinafter mentioned.

III.

This action arises under Section 24 (1) and Section 274 (d) of the Judicial Code, as amended.

IV.

The City of Alameda and the City of Oakland are both situated upon the east shore of San Fran-

cisco Bay, a navigable body of water. Both said cities are located within Alameda County, State of California, and are separated from each other by a navigable body of water known at various times and in various quarters by the following names: San Antonio Estuary, Oakland Estuary, Oakland Harbor, Inner Harbor and Tidal Canal and Alameda Estuary. Said body of water is roughly seven miles in length, extending in a general east and west direction from San Leandro Bay, an arm of San Francisco Bay, on the east, to another point in San Francisco Bay proper at the end [148] of the moles of the Southern Pacific Railroad Company and the Western Pacific Railroad Company on the west. Said Estuary constitutes what is commonly known as Oakland's inner harbor; the outer harbor extending in a northeasterly direction for about two miles from the entrance to the inner harbor. The westerly end of the Estuary, for a distance of about two miles, is an entrance channel, protected by stone retaining walls on either side. Said entrance channel varies from Seven Hundred and Fifty to Eight Hundred and Fifty feet in width. Immediately east of said entrance channel lies the main portion of the inner harbor, with docking facilities; the width of the channel here being Six Hundred feet, and the natural harbor varying from Six Hundred and Fifty feet at the narrowest points to about Three Thousand Five Hundred Feet at the easterly end where the harbor widens to form what is known as Brooklyn Basin.

Easterly of Brooklyn Basin and forming a continuous part of the same body of water is the "Tidal Canal" nearly two miles in length connecting the inner harbor with San Leandro Bay. Said Tidal Canal was originally dredged by the United States for the purposes set forth in the condemnation proceedings entitled the United States, plaintiff, vs. Crooks, County of Alameda, Central Pacific Railroad Company, et al., defendants, hereinafter referred to. With reference to variations in the water level in said Tidal Canal, it is hereby stipulated that the Court may take judicial notice of the data as to height of high and low water contained in a booklet entitled "Tide Tables Pacific Ocean and Indian Ocean 1940, United States Department of Commerce, Coast and Geodetic Survey."

V.

In the year 1874 Congress enacted the Rivers and Harbors Act for that year, in which the sum of $100,000 was appropriated "for the improvement of Oakland Harbor;" (18 Stat. 237, c. 457) to be expended under the direction of the Secretary of War. [149]

In 1876 the United States instituted a condemnation proceeding in the District Court of the Third Judicial District in and for the State of California (now the Superior Court of the State of California, in and for the County of Alameda) to acquire a right of way for the said Tidal Canal, said action being entitled The United States, plain-

tiff, v. Crooks, County of Alameda, Central Pacific Railroad Company, et al., defendants, action No. 3590 in the records of the County Clerk of the County of Alameda for the District Court of the Third Judicial District, the State of California, in and for the County of Alameda. A full and true copy of each of the following documents in said condemnation proceeding is hereto attached, marked as designated and thus by reference is incorporated herein and made a part hereof:

Exhibit 1 (a) Complaint;

Exhibit 1 (b) Map of Tidal Canal (This map, prepared by United States Army Engineers Office in 1882, is attached in lieu of maps and surveys referred to in the Complaint in United States v. Crooks);

Exhibit 1 (c) Opinion and Decision;

Exhibit 1 (d) Findings of Fact and Conclusions of Law;

Exhibit 1 (e) Decree.

VI.

In said suit the County of Alameda and the Central Pacific Railroad Company were named, among others, as defendants and the United States sought to condemn the rights of the County and of the railroad in certain highways and railroad rights of way which crossed the proposed Tidal Canal at the places where the Fruitvale Avenue, High and Park Street bridges are now located, and at Washington Avenue, where a railroad right of way was

then located. The right of way and tracks of the Central Pacific Railroad Company, which crossed the proposed Tidal Canal at Fruitvale Avenue, paralleled and adjoined the right of way of the county road belonging to the defen- [150] ant, County of Alameda, which also crossed the proposed Tidal Canal at Fruitvale Avenue.

The County of Alameda and the railroad company asked for no damages in said condemnation proceedings, and in the decree in said action hereinabove referred to, it was provided, among other things:

> "Defendants, the County of Alameda, The Central Pacific Railroad Company, Charles Heinecke and S. A. Smith, not having claimed damages, no damages are awarded to them.
>
> "It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the lines of said canal."

VII.

After said decree of condemnation, the United States constructed said Tidal Canal to the extent shown on a map hereto attached and marked Exhibit 2 and thus by reference is incorporated herein and made a part hereof, and constructed, and until

November 17, 1913, maintained and operated highway drawbridges at Park Street and High Street, and a combination railroad, vehicular and pedestrian drawbridge at Fruitvale Avenue. Although said map is dated 1912, said map actually shows the conditions of said Tidal Canal and of said bridges as they existed prior to 1909. The Park Street Bridge was completed in 1891; the High Street and Fruitvale Avenue Bridges were completed in 1901 and said construction of said Tidal Canal was completed in 1903.

The bridges were constructed as drawbridges of the swing type, turning or pivoting horizontally upon central piers, and were equipped with hand-operated machinery. It took approximately thirty minutes to open and thirty minutes to close each of these bridges. After these bridges were equipped with electrical operating machinery, [151] as hereinafter set forth, it took from two to three minutes to open, and the same time to close each of said bridges.

Prior to said installation of electrical operating machinery the United States did not regularly operate said bridges, but did, on occasions, open and close them on request of private interests for the passage of vessels; private interests on occasions also opened and closed said bridges on their own responsibility for the passage of vessels which could not clear said bridges when closed; and boats, barges and scows which could clear said bridges when closed plied up and down said Tidal Canal.

VIII.

Prior to the institution of said condemnation proceedings the Central Pacific Railroad Company (predecessor of defendant Central Pacific Railway Company) was the owner of two lines of railroad extending across the lands sought to be condemned. One line of said railroad was on or adjoining Fruitvale Avenue, and the other line was on or adjoining Washington Avenue, across the site of the proposed Tidal Canal, in said Alameda County, and the said Central Pacific Railroad Company was the owner of rights of way in said two lines of railroad, and was a party defendant in said condemnation proceedings.

IX.

On March 7, 1901, an agreement in writing was entered into between the United States, Central Pacific Railway Company (said Central Pacific Railway Company having succeeded to the interest of said Central Pacific Railroad Company) and the Southern Pacific Company (lessee of Central Pacific Railway Company), under which agreement the Central Pacific Railway Company in consideration of $50,000 agreed to abandon its line of railroad on or adjoining Washington Avenue, and to relieve the United States of any obligation to construct or maintain a drawbridge across said Tidal Canal [152] at Washington Avenue. A full and true copy of said agreement is attached to the complaint herein marked Exhibit II thereof and thus by reference is made a part hereof.

X.

On December 6, 1909, the Board of Supervisors of Alameda County adopted a Resolution, a full and true copy of which is hereto attached and marked Exhibit 3 and thus by reference is incorporated herein and made a part hereof.

XI.

In the Rivers and Harbors Act, approved June 25, 1910, 36 Stat. 630, c. 382, it is provided, inter alia, as follows:

> "Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities: Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer."

XII.

Thereafter, on September 3, 1910, the Secretary of War issued a license to the County reading in part as follows:

> "unto the Board of Supervisors of Alameda County, California, a License, revocable at

will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California."

A full and true copy of said license is hereto attached and marked Exhibit 4 and thus by reference is incorporated herein and made a part hereof.

XIII.

Thereafter, on November 10, 1913, the Board of Supervisors of Alameda County adopted a resolution, a full and true copy of which is attached hereto and marked Exhibit 5 and thus by reference is incorporated herein and made a part hereof. [153]

XIV.

Thereafter the said bridges were operated, repaired and maintained at the expense of said County and have been so repaired, maintained and operated except that the bridges at Park Street and High Street have been reconstructed and are now operated, repaired and maintained under other arrangements between the United States and said County which are of no significance to the present case.

XV.

The total cost to the United States for the repair and electrification of said Fruitvale Avenue, High Street and Park Street Bridges was $21,358.80.

The annual cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge commencing during the fiscal year 1913-

14 to and including the fiscal year 1938-39 is hereinafter set forth. The annual costs paid by the County of Alameda for maintaining and operating the High Street and Park Street Bridges commencing during the fiscal year 1913-14 to the respective fiscal year of commencement of reconstruction of the High Street and Park Street Bridges are also set forth as follows:

Fiscal Year	Fruitvale Avenue Bridge	High Street Bridge	Park Street Bridge
1913-14	$ 1,937.84	$ 1,875.48	$ 2,891.21
1914-15	11,842.51	14,146.76	9,684.14
1915-16	3,078.39	2,344.54	4,078.73
1916-17	4,072.45	3,953.74	2,840.85
1917-18	5,075.85	2,826.06	6,224.64
1918-19	6,949.80	6,652.10	10,153.72
1919-20	7,812.75	9,769.53	10,357.54
1920-21	18,465.73	6,103.83	9,167.29
1921-22	6,671.50	6,884.75	13,644.52
1922-23	7,215.71	6,795.90	13,503.47
1923-24	6,331.12	14,406.92	8,048.20
			[154]
1924-25	7,558.69	9,940.27	7,466.12
1925-26	10,037.87	6,832.69	9,972.74
1926-27	8,322.69	7,485.69	7,856.16
1927-28	7,751.94	9,690.75	13,502.22
1928-29	9,888.50	10,965.56	21,003.10
1929-30	12,797.87	22,319.42	10,116.56
1930-31	29,738.53	13,150.33	12,766.64
1931-32	13,840.17	11,472.59	15,079.37
1932-33	10,130.60	9,668.81	11,888.35
1933-34	11,398.59	14,379.24	
1934-35	13,168.07	11,193.94	
1935-36	11,332.04	11,193.42	
1936-37	12,005.73	11,923.38	
1937-38	12,663.73	14,695.79	
1938-39	12,059.52		
Total	$262,148.19	$240,672.69	$200,245.57

The total cost paid by the County of Alameda for maintaining and operating said Bridges for the periods of time hereinabove set forth was $703,-066.45.

Subsequent to the end of the fiscal year 1938-39 the average cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge has been approximately One Thousand Dollars ($1,000.00) per month, and the cost of replacing this Bridge is estimated to be approximately One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00).

The total cost of maintaining, operating or replacing said Bridges since November 17, 1913, has exceeded the income and revenues provided for the fiscal year 1913-14, or any fiscal year prior thereto, and the expenditure was not assented to by two-thirds [155] of the qualified electors of the County of Alameda voting at an election held for that purpose.

In the fiscal year 1913-14, and in each fiscal year thereafter, the income and revenue provided by the County of Alameda for each such fiscal year was sufficient to pay for the maintenance and operation of said Fruitvale Avenue Bridge for each such one (1) fiscal year.

In the fiscal year 1913-14, and in each fiscal year thereafter, prior to the respective fiscal year of the commencement of the reconstruction of the High Street and Park Street Bridges, the income and revenue provided by the County of Alameda for

each such fiscal year was also sufficient to pay for the maintenance and operation of said High Street and Park Street Bridges for each such one (1) fiscal year.

XVI.

The Fruitvale Avenue Bridge is a combination railroad, vehicular and pedestrian swing span drawbridge, built upon a single concrete center pier, and has been operated and repaired since November 17, 1913, at the expense of the County of Alameda as hereinabove alleged.

The tracks and right of way of the Central Pacific Railway Company and its lessee the Southern Pacific Company are and were at all times permanent, integral and inseparable parts of the Fruitvale Avenue Bridge as constructed, and said tracks and right of way are, and since the said construction were used by the Central Pacific Railway Company and its lessee the Southern Pacific Company for the transit of both freight and interurban passenger trains over said Fruitvale Avenue Bridge. Both the Central Pacific Railway Company and the Southern Pacific Company are and were at all times private corporations. The Central Pacific Railroad Company was at all times a private corporation. [156]

XVII.

The City of Oakland is on the mainland side of San Francisco Bay. Said city is, and prior to 1909, was, the terminal of all transcontinental railroads in central and northern California. Subsequent to

the construction of the Park Street, High Street and Fruitvale Avenue Bridges, the population of the cities of Oakland and Alameda increased steadily and substantially as hereinafter set forth. Industry, shipping and commerce, both interstate and with foreign countries, as well as intrastate, increased proportionately in said cities. Traffic connected with said intrastate, interstate and foreign commerce likewise increased upon the waters described in paragraph IV hereof, including the waters of the Tidal Canal. Traffic upon the three bridges spanning said Tidal Canal also increased.

The Fruitvale Avenue Bridge connects residential and industrial sections of the City of Alameda with similar sections of the City of Oakland via Fruitvale Avenue, which Avenue is also a principal thoroughfare cutting through all the main traffic arteries between the Tidal Canal and the countryside. The Fruitvale Avenue Bridge carries the only rail connection both freight and interurban passenger traffic between the mainland and the City of Alameda, which is entirely surrounded by water.

The population of the County of Alameda according to the official census of the United States from 1890 to 1930, both years inclusive, is as follows:

Year	Population
1890	93,864
1900	130,197
1910	246,131
1920	344,177
1930	474,883

The respective populations of the City of Alameda and the City of Oakland, which two cities are separated by the Tidal Canal, according to the official census of the United States from 1880 to 1930, both years inclusive, is as follows:

City of Alameda

Year	Population
1880	5,708
1890	11,165
1900	16,464
1910	23,383
1920	28,806
1930	35,033

City of Oakland

Year	Population
1880	34,555
1890	48,682
1900	66,960
1910	150,174
1920	216,261
1930	284,063

XVIII.

On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of County of Alameda v. Ross, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460, hereinafter referred to. A full and true copy of said notice is hereto attached and marked Exhibit 6 and thus by reference is incorporated herein and made a part hereof. Said County has

since agreed to operate said Bridge until March 31, 1940, but in so doing it has [158] waived no rights, has expressly retained all rights it may have in the premises, and the position of the County of Alameda in this suit is not to be prejudiced in any way by such operation. In the event that said County subsequently agrees to operate said Bridge until a time after March 31, 1940, or extends said period from time to time, it will waive no rights, will expressly retain all rights it may have in the premises, and the position of the County of Alameda in this suit is not to be prejudiced in any way by such operation or by such extension or extensions of time.

XIX.

Thereafter, on July 27, 1939, the Central Pacific Railway Company and the Southern Pacific Company served notice upon the plaintiff herein requesting that the plaintiff comply with the Decree in the case of United States v. Crooks, and others, hereinabove referred to, and cause the Fruitvale Avenue Bridge to be inspected, maintained and renewed. A full and true copy of said notice is hereto attached and marked Exhibit 7 and thus by reference is incorporated herein and made a part hereof.

XX.

The decision of County of Alameda v. Ross, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460, held the alleged license agreement now before this Court to be void. The "Petition for Writ of Mandate" was filed originally in the Supreme Court of the State

of California on November 25, 1938. On November 28, 1938, said Supreme Court transferred the above entitled matter to the District Court of Appeal of the Third Appellate District of the State of California for hearing and determination. The decision was duly entered on April 12, 1939. On May 19, 1939, a Petition to the Supreme Court of the State of California for hearing after said decision was filed in said Supreme Court. Said application to have the cause heard in the Supreme Court after said judgment was denied by the Supreme Court on June [159] 1, 1939. The Court, in the said case of County of Alameda v. Ross, supra, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909. The United States was notified by the District Attorney of the County of Alameda, as counsel for the County of Alameda, of the filing of said "Petition for Writ of Mandate" in said action. Copies of all papers filed in said action by both petitioner and respondent, including the stipulation of facts and all briefs, were sent to and received by the United States Attorney in San Francisco during the proceedings and before the case was submitted.

Dated: March 21, 1940.

FRANK J. HENNESSY,
United States Attorney
W. E. LICKING,
Assistant United States Attorney
BRICE TOOLE,
Attorney, Department of Justice
Attorneys for Plaintiff

E. J. FOULDS,

Attorney for Defendants, Southern Pacific Company and Central Pacific Railway Company. [160]

RALPH E. HOYT,

District Attorney for the County of Alameda, State of California

By J. F. COAKLEY,

Chief Assistant District Attorney for the County of Alameda, State of California

ROBERT H. McCREARY,

Deputy District Attorney for the County of Alameda, State of California

Attorneys for Defendant, County of Alameda. [161]

EXHIBIT 1 (a)

COMPLAINT

in

United States v. Crooks, et al. [162]

In the District Court of the Third Judicial District
of the State of California,
In and for the County of Alameda.

THE UNITED STATES,

Plaintiff,

vs.

M. CROOKS, J. D. FARWELL, R. SIMSON, H. GIBBONS, Alameda County, A. A. Cohen, Central Pacific Railroad Company, P. Sather, J. M. Valdez & W. H. Glascock, G. G. Briggs, A. Ford, Charles Meinicke, M. Klinkofstrom, C. H. Strybing, H. Hansmann, Charles Baum, Gottlieb Muecke, H. A. Gildemeister, Edmund Janssen and Frederick Roeding, T. A. Smith, Oakland Water Front Company, B. S. Alexander, B. S. Brooks, Caroline E. Chipman, Eli Corwin, John Sroufe, C. H. Bradley, H. W. Carpentier, O. Eldridge, Mary A. Fitch, E. Forge, J. C. Hayes and John Caperton, J. G. Kellogg, Annis Merrill, G. H. Mendell, E. B. Mastick, Nathan Porter, Mrs. Julia Page, C. S. Stewart, H. M. Whitney,

Defendants.

The United States, the plaintiff herein, by its attorney, Walter Van Dyke, brings this action

against said defendants, and for cause respectfully shows:

That the Central Pacific Railroad Company, and the Oakland Water Front Company are severally corporations formed and created by and in pursuance of law.

That the defendants are the owners and claimants of a certain tract or strip of land lying between the San Leandro and San Antonio estuaries, in said County and State, delineated on the survey and maps attached to this complaint, within the blue lines, and more particularly bounded and described as follows: to wit: [163]

Area required, 88 66-100 acres, a little more or less.

That the United States of America is duly authorized and empowered to improve Oakland Harbor, in said County and State, in the interest of commerce, and for that purpose it becomes and is necessary to turn the water from San Leandro Bay or estuary through a tidal canal into the head of San Antonio estuary, so as to increase the tidal flow into and through said San Antonio estuary, which forms said Oakland Harbor, for the purpose of removing the sediment from the same, and thereby increasing the depth of water, and improving said Oakland Harbor.

That to make and excavate said tidal canal for the flow of the tides into the head of San Antonio estuary—said Oakland Harbor—as proposed, it becomes and is necessary to have and use the tract

or strip of land above described, over and across which to make and excavate the said canal.

That this proceeding is instituted for the purpose of condemning said tract and strip of land for the use aforesaid; that the taking of said land is for a public use, authorized by law, and by the Government of the United States.

That the following is a description of each piece of land sought to be taken for the public purpose and use aforesaid, and showing whether the same includes the whole or only a part of an entire parcel or tract, to wit: [170]

Wherefore, the plaintiff prays that the said parcel, piece or strip of land, first above described, (and delineated on said map and surveys, within the blue lines,) be condemned, and the title thereto, in fee simple, be vested in the United States, for the public uses and purposes aforesaid.

(Signed) WALTER VAN DYKE
U S Atty [187]

EXHIBIT 1 (b)

Map of Tidal Canal (This map, prepared by United States Army Engineers Office in 1882, is attached in lieu of maps and surveys referred to in the Complaint in United States v. Crooks). [188]


CANAL
KENNEDY ST.
23rd Ave
FORD ST.
PARK ST.
PETERSEN ST.
GLASCOCK
DERBY ST.
LANCASTER ST.
VALDEZ & GLASCOCK
NEW HARRISON AVE.
GG Bridges
Oakland Water Front Co & others
T.L.S—424
U.S. Pierhead Line
U.S. Bulkhead Line
OAK ST.
PARK ST.
LANDING
EVERETT ST.
Ave.
CLEMENT Ave
BROADWAY
LINCOLN ST.

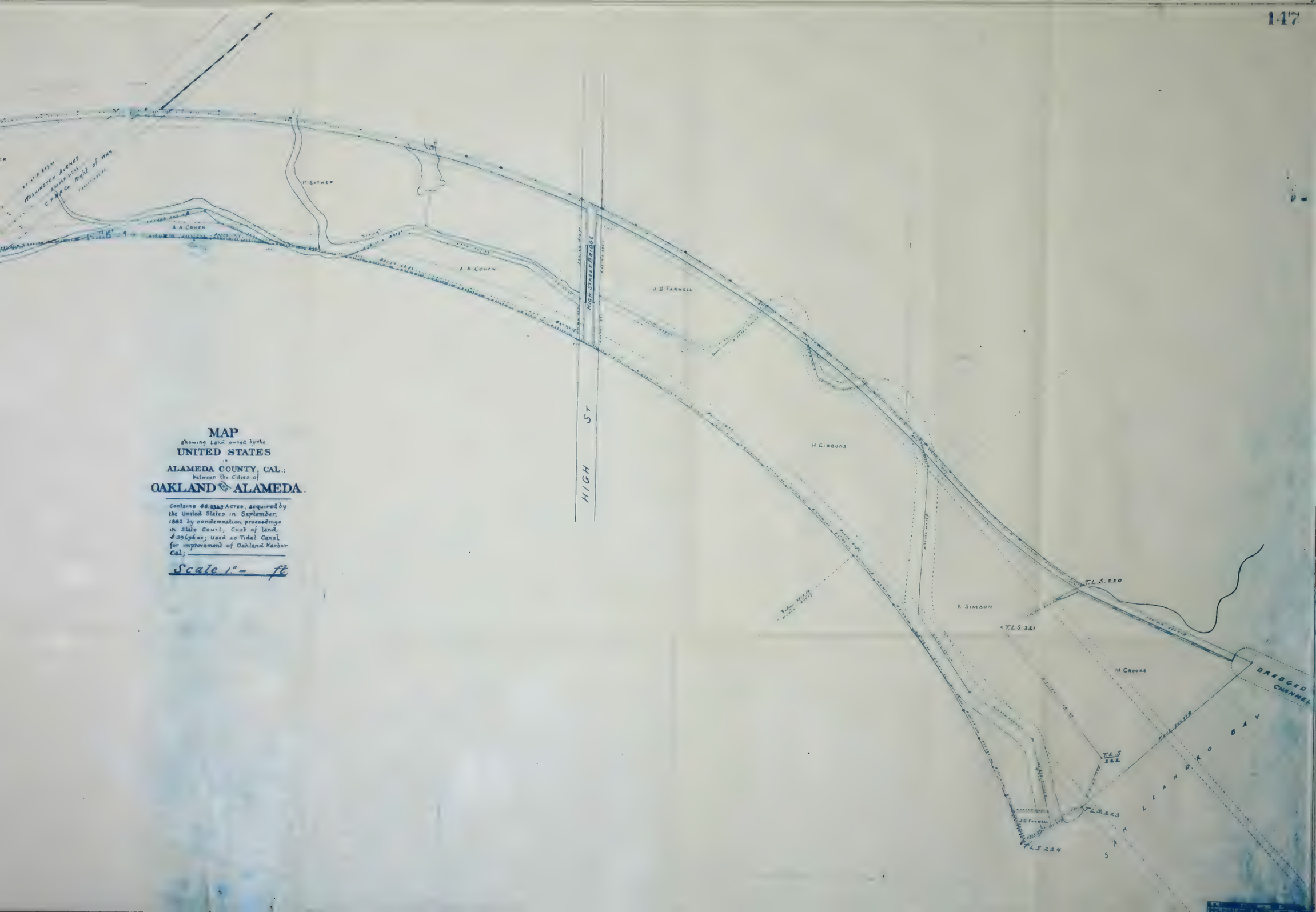

MAP
showing Land owned by the
UNITED STATES
in
ALAMEDA COUNTY, CAL.;
between the Cities of
OAKLAND & ALAMEDA.
Contains 66.4343 Acres, acquired by the United States in September, 1882 by condemnation proceedings in State Court, Cost of land $39696.00; Used as Tidal Canal for improvement of Oakland Harbor Cal;
Scale 1" = ft
WASHINGTON AVENUE
C P R R Co Right of Way
F. SATHER
A. A. COHEN
A. A. COHEN
HIGH STREET BRIDGE
HIGH ST.
J. D. FARWELL
H. GIBBONS
R. SIMSON
T.L.S. 220
T.L.S. 221
M. CROOKS
DREDGED CHANNEL
T.L.S. 222
T.L.S. 223
J.D. FARWELL
T.L.S. 224
ALAMEDA
BAY

EXHIBIT 1 (c)

Opinion and Decision in United States v. Crooks, et al. [190]

In the Superior Court of the County of Alameda, State of California

THE UNITED STATES

vs.

M. CROOKS et al.

The question of the right of Plaintiff to maintain this action having been raised by some of the defendants and heretofore submitted to and decided by this Court in favor of such right it only remains to determine the damages and compensation to be paid to the several defendants for the land proposed to be taken from each and the improvements thereon and such damages as will result to the owner of land by segregating a part from the larger parcel. The rule by which the Court is to be governed is laid down in the Code of Civil procedure of this State, as follows:

Section 1248. The Court must hear testimony and thereupon must ASCERTAIN and ASSESS.

1st. The value of the property sought to be condemned and all improvements THEREON pertaining to the REALTY etc.

2nd. If the value of the property sought to be condemned constitutes only a PART of a larger PARCEL, the damages which will accrue to the

portion NOT sought to be condemned by reason of ITS SEVERANCE from the portion sought to be condemned, and the Construction of the improvement in the manner proposed by the Plaintiff.

3d. How much the portion NOT sought to be condemned will be benefited if at all by the construction of the improvement proposed by the Plaintiff and if the benefits be equal to the damages assessed under Subdivision TWO the owner of the parcel shall be allowed no compensation except the value of the PORTION taken. [191]

Section 1249. For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the DATE of the summons, and its ACTUAL value at that DATE shall be the measure of compensation for all property ACTUALLY TAKEN and the basis of damages to property NOT actually taken but INJURIOUSLY AFFECTED in all cases where such damages are allowed under Section 1248.

The Summons in this case bears date March 4th 1876, that is therefore the date at which values and damages are to be ascertained and assessed.

The only claim for damages other than compensation for the value of the land sought to be condemned under subdivision two was and is made on the part of one of the defendants and on the following ground to wit: 1st, it would deprive this defendant of the benefit of certain gravel which in the rainy season is deposited on his land through a small creek running through a portion of it and of

the water which stays in said creek for several months in the year and serves to water stock, second because the proposed canal would cut off defendants land from the mainland of the county and the portion not taken would in consequence thereof be greatly depreciated in value by reason of such severance of communication with the main land, and because it would have the effect of leaving defendants land together with the whole Town of Alameda surrounded by water.

Upon these propositions or claims for damage testimony was given tending to show great depreciation in value of the portion of the tract not condemned, but all such damages (except as to the gravel deposits and water) are common to all the lands southerly of the proposed canal and do not particularly or exclusively injuriously affect defendants land more than it affects all other lands on the same side of the canal, and not only so but [192] if such damages accrue at all it is not by reason of the severance of the portion proposed to be condemned from the larger parcel not proposed to be condemned but is in consequence of the construction of the canal itself in that vicinity. There was no improvements pertaining to the realty upon the portion sought to be condemned except that it would necessitate the removal of a few rods of fencing. Damages for which removal were waived by defendant, and the property of defendant in other respects remains after the construction of the Canal for all purposes for which it has been or is now used as if no such Canal was constructed.

For these considerations it is not deemed that such damages are allowable under the code.

The theory of the construction of this canal is that it is a necessary part of the plan for the improvement of Oakland Harbor for the benefit of Commerce, and in such cases individual rights and claims to the soil and prospective values or use of land are subordinate to the public necessity. Only that such actual compensation and damages shall be allowed as will compensate for the property taken and any special damages that may result directly by reason of the severance of a portion from a larger tract.

As to damages to be allowed or claimed upon the assumption that the construction of the canal as proposed will deprive the defendant of certain deposits of gravel annually accumulating during the rainy seasons, and the water which remains for the use of stock a portion of the year. It is not clear to the court as to the legal right of defendant to any claim therefor and in view of the fact that precisely the same consequences would result, if the canal were constructed a hundred yards or more northerly from the northerly line of defendants land without taking any of it and that such damage do not arise from the taking of any part of defendants land but solely from the nature of the [193] construction of the canal and also in view of the fact that the damages are to be estimated as far back as 1876 and that defendant has not as yet suffered any such damage, and in further con-

sideration that it does not follow that because large quantities of gravel have hitherto been annually deposited upon defendants land that such results would continue for any given or indefinite time, or that if continued it would be a source of profit. And also because of such damages being consequential remote and uncertain of just estimation it is deemed that they are not such damages as are embraced in the damages contemplated by the code.

As the law requires the benefits to be estimated to compensate for damages, other than for the land taken, and in this case no such damages being allowed no necessity arises for assessing the benefits that may flow from the improvement. Indeed aside from the value of the land taken should hold from the testimony that any damage by depreciation of values that might result from the construction of the canal is compensated by the benefits that may reasonably be expected from the improvement proposed.

This leaves for determination the sole question of the compensation to be allowed to the several defendants for the land proposed to be taken or the actual value of each parcel on March 4th, 1876.

Upon this question of values numerous witnesses have testified some of whom are claimed to be experts by reason of having been engaged for a series of years in the buying and selling of real estate both in San Francisco City and County and Alameda County and in and about the land in question others old residents in the neighborhood of the

lands proposed to be taken who claim to be able to determine the values by reason of long residence in the vicinity of and familiarity with the lands proposed to be condemned, and in addition the County Assessors of Brooklyn Township and Alameda [194] Township wherein said lands are located who have for years before and since the 4th of March 1876 assessed the identical lands in question being required by law to fix thereon a cash valuation.

The testimony of these several witnesses as to the values of these lands in 1876 range from $10 to $750 per acre for the Marsh lands, and from $300 to $1250 per acre for the up lands (so-called). It is manifest that these estimates are largely based upon prospective and not upon actual values for according to the testimony of one of the witnesses no land is worth to exceed $250 for production uses. It follows that the basis of the estimates of values of the lands proposed to be taken by the several witnesses not being founded upon the productive capabilities of the soil nor upon actual transactions of sales or offers to purchase must to a large extent be founded upon their location as being in the vicinity of the Towns of Alameda andOakland and consequently at some time required for residences or business purposes depending upon the growth of said Towns this would give them an actual commercial value as an investment larger or smaller according to the faith of the witness or purchaser in the growth of the Towns.

It will be perceived that a satisfactory estimate of values under such testimony is not free from difficulty but the court has decided to allow as compensation to the owners and claimants of the several tracts of land proposed to be taken the amounts set forth in the Schedule hereto.

[195]

Schedule

No. Acres	Names of Claimants	Character of lands	Values Assessed $ cts.
5.48	M Crooks	mudflats & tidelands	274.00
3.18	Mrs. E. Farwell	marshland	795.00
6.21	R Simpson	marshland	1,242.00
10.26	H Gibbons	pt up or high. prt marsh	3,000.00
2.72	A A Cohen	Upland	2,176.00
14.47	P. Sather	pt marsh bal up	9,405.00
19.58	Glascock & Valdez	all upland	15,664.00
3.64	G G Briggs	pt marsh	2,548.00
—			
.89	Ford	Upland	712.00
15.72	Oakland Water front Co.	marshland	3,880.00
			$39,696.00
.82	Central Pacific RR Co.	Road bed no claim for damages	
1.70	Fruit Vale & Washington Avenue	Road bed	no claim
74	Park Avenue		no claim
34	T A Smith		no claim
16	C Menke		do

Whole amount of land proposed to be taken for the construction of the canal 86 66/100 acres. including the roadways which amount in the aggregate to 3 89/100 acres leaving the quantity of land to be paid for of various grades 82 77/100 acres.

The Government will erect suitable bridges on all crossings upon the road now leading out of the

Town of Alameda that are crossed by the canal and pay the costs of this action. The Plaintiff will prepare findings and a decree in accordance with this opinion.

August 31st, 1882.

N. HAMILTON,

Judge [196]

EXHIBIT 1 (d)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

in

United States v. Crooks, et al. [197]

In the Superior Court of the County of Alameda, State of California

No. 3590 in late 3rd District Court

THE UNITED STATES,

Plaintiff,

vs.

M. CROOKS et al.,

Defendants.

This cause came on for trial on the 7th day of December, 1881. Before the trial, in consequence of the death or transfer of interest of some of the original defendants the representatives or successors in interest of such defendants respectively were thereupon, on motion and by consent of the

respective parties, substituted in place of the said former defendants, deceased, or who had transferred their interest, to wit:

Susan Crooks, in place of M. Crooks, deceased; Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander and Marion Alexander in place of B. S. Alexander, deceased;

Defendant Charles Meinicke in place of M. Klinkofstrom, C. H. Strybing, H. Hansmann, Charles Baum, Gottlieb Muecke, H. A. Gildemeister, Edmund Janssen and Frederick Roeding, whose interests were transferred to said Meinicke;

A. E. Davis in place of Caroline E. Chipman, E. Forge, J. C. Hayes, Annis Merrill, Mary A. Fitch, Thadeus S. Fitch, S. A. Chapin, C. C. Stevenson, Nathan Porter, Wm. McAfee and James Spiers whose interests were transferred to said Davis. Defendant H. W. Carpentier in place of John Sroufe, C. H. Bradley, Eli Corwin and H. M. Whitney, whose interests were transferred to defendant Carpentier;

And the said several parties by their Attorneys in [198] open court, expressly waived a jury and consented and agreed to a trial by the Court sitting without a jury.

The trial thereupon proceeded before the Court sitting without a jury, and was continued from time to time, a large number of witnesses being produced and examined by their respective parties and documentary and written testimony introduced. And thereafter the case was argued by counsel for

the respective parties, and on the 1st day of June 1882, was finally submitted to the Court for its decision.

And now having fully considered the case the Court finds and renders its decision as follows, to-wit:

That the plaintiff, the United States of America, is duly authorized and empowered to improve Oakland Harbor in the said County of Alameda, State of California, in the interest of commerce, and said Harbor is a public navigable Harbor; and that to carry out the improvement of said Oakland Harbor, it is necessary to turn the water from San Leandro Bay or Estuary into and through San Antonio Estuary, which latter forms Oakland Harbor, for the purpose of removing the sediment from the same thereby increasing the depth of water in said Harbor. That to turn the tide water from San Leandro Bay to the head of Oakland Harbor it is necessary to cut a canal through the low neck of land lying between the two bays or Estuaries.

That for a canal to answer the purpose contemplated it will require the strip of land mentioned in the complaint and delineated on the map of survey, attached to said complaint and hereafter described, and that it is necessary to take said strip of land over and across which to make and excavate said canal.

That the use for which said strip of land is to be taken, towit, said tidal canal, is a public use authorized by law and by the government of the

United States; that such taking [199] is necessary to such use.

That the location of said proposed canal, as hereinafter particularly described, has been made in the manner which will be most compatible with the greatest public good and will do the least private injury.

That the public use herein mentioned is a more necessary public use than that to which any portion of said strip of land has already been appropriated.

That the said strip of land to be taken is more particularly bounded and described as follows, to-wit: [200]

That said property so sought to be condemned is of the value of $39,696.00.

That said tract or strip of land sought to be condemned consists of different parcels owned and claimed by different parties, to-wit: said defendants severally; and the value of each of said different parcels and each estate and interest therein separately assessed, are as follows, to-wit: [206]

That G. W. Dent a defendant herein filed an Answer setting up some claim to the Marsh land in controversey which claim to said and other Marsh lands has been adjudicated in this Court as to said title to said Marsh land and the claim of said Dent thereto, and the title and claim of said Dent thereto was by said Court decided to be invalid.

There are no damages to the property sought to be condemned by reason of its severance from the portion sought to be condemned and the construc-

tion and the improvement in the manner proposed by the plaintiff.

That it is necessary to construct and keep in repair good and sufficient bridges across said canal and all the public roads and railroads now leading from the town of Alameda across the line of said proposed canal and all roads now used as public highways whether so declared or not.

CONCLUSIONS OF LAW

From the foregoing facts the Court finds as a conclusion of law that the plaintiff is entitled to a judgment and decree condemning said tract or strip of land herein first described for the public use aforesaid upon paying the amount of damages herein assessed to the parties entitled thereto, respectively, or their attorneys, or by paying the aggregate sum assessed as damages into this Court for said respective parties.

That in the construction of said canal the plaintiff at its own cost, construct and keep in repair suitable bridges, across the same on all the Public highways and railroads now crossing the line of said canal and all roads now used as public highways whether so declared or not and It Is So Ordered.

N. HAMILTON,
Judge. [225]

EXHIBIT 1 (e)

Decree in United States v. Crooks, et al. [226]

In the Superior Court of the County of Alameda, State of California

No 3590 in the late 3rd District Court

The United States,

Plaintiff,

v.

Susan Crooks, Executrix of the last Will and Testament of M. Crooks, deceased, J. D. Farwell, Mrs. E. Farwell, R. Simson, H. Gibbons, Alameda County, A. A. Cohen, Central Pacific Railroad Company, P. Sather, J. M. Valdez and W. H. Glascock, G. G. Briggs, A. Ford, Charles Meinicke, T. A. Smith, Oakland Water Front Company, Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander and Marion Alexander, B. S. Brooks, A. E. Davis, H. W. Carpentier, O. Eldridge, John Caperton, J. G. Kellogg, G. H. Mendell, E. B. Mastick, Mrs. Frances E. Page, C. S. Stewart, G. W. Dent,

Defendants.

DECREE

This cause came on regularly for trial before the Court, a trial by jury having been expressly waived, and it being stipulated that the same be tried by the Court sitting without a jury, the parties by their respective Attorneys being present in Court and consenting thereto;

It having been suggested to the Court that since the commencement of the action defendant M. Crooks had died, on motion Susan Crooks, Executrix of the last Will and Testament of Mathew Crooks, deceased, was substituted as defendant in place of said M. Crooks, deceased; also that defendant B. S. Alexander had died, and that his estate had been settled, closed and distributed to his heirs Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander, and Marion Alexander, on motion said heirs were substituted as defendants in place of [227] said B. S. Alexander, deceased. It also appearing that defendant Charles Meinicke had since the commencement of the action succeeded to the interest of defendants M. Klinkofstrom, C. H. Stirling, H. Hansman, Charles Baum, Gottlieb Muecke, H. A. Gildemeister, Edmund Janssen, and Frederick Roeding, on motion said defendant Meinicke was substituted as defendant for said other last named defendants. And it further appearing that since the commencement of said action A. E. Davis had succeeded to the interest of defendants Caroline E. Chipman, E. Forge, J. C. Hayes, Annis Merrill, Mary A. Fitch, Thadeus S. Fitch, S. A. Chapin, C. C. Stevens, Wm. McAfee, James Spiers and Nathan Porter, on motion said Davis was substituted as defendant in place of said former defendants Chipman, Forge, Hayes, Merrill, Fitch—M. A. and T. S., —Chapin, Stevens, McAfee, Spiers and Porter. And it further appearing that defendant H. W. Carpentier had since the commencement of said action suc-

ceeded to the interest of defendants John Stroufe, C. H. Bradley, Eli Corwin and H. M. Whitney, on motion said H. W. Carpentier was substituted as defendant for said defendants Sroufe, Bradley, Corwin and Whitney.

Whereupon a large number of witnesses were produced on the part of the plaintiff and the defendants examined, and documentary and written testimony introduced, and the testimony being closed, the cause was argued by the respective counsel and submitted to the Court for consideration and decision; and after due deliberation thereon the Court delivered its findings and decision in writing which were filed herein on the 25th day of September, 1882.

Wherefore by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that the plaintiff herein have judgment for the condemnation of the tract or [228] strip of land, in the complaint and said findings set forth and herein after described, upon the payment to the defendants of the sums of money respectively found to be due them as damages assessed for the taking of said land, as set forth in said findings or that said plaintiff deposit in Court the aggregate sum so found due the defendants, to wit, the sum of Thirty nine thousand six hundred and ninety six ($39,-696.00) Dollars for the said defendants respectively to be distributed to them according to said findings, towit:

To defendant Susan Crooks, executrix of the last

Will and Testament of M. Crooks, deceased, and substituted as defendant in this proceeding in place of said M. Crooks, deceased, Two Hundred and seventy four ($274) Dollars;

To defendant Mrs. E. Farwell, Seven hundred and ninety five (795) Dollars;

To defendant R. Simson, Twelve Hundred and forty two (1242) Dollars;

To defendant H. Gibbons Three thousand (3000) Dollars;

To defendant A. A. Cohen, Two thousand one hundred and seventy six (2176) Dollars;

To defendant P. Sather, Nine thousand four hundred and five (9405) Dollars;

To defendants J. M. Valdez and W. H. Glascock Fifteen thousand six hundred and sixty four (15664) Dollars;

To defendant G. G. Briggs Two thousand five hundred and forty eight (2548) Dollars;

To defendant A. Ford seven hundred and twelve (712) Dollars;

To defendants Oakland Water Front Company, Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander, Marion Alexander, B. S. Brooks, A. E. Davis, H. W. Carpentier, [229] O. Eldridge, John Caperton, J. G. Kellogg, G. H. Mendell, E. B. Mastick, Mrs. Frances E. Page and C. S. Stewart, Three thousand Eight hundred and Eighty (3880) Dollars;

Defendants the County of Alameda, the Central Pacific Railroad Company, Charles Meinicke and

T. A. Smith—not having claimed damages, no damages are awarded to them.

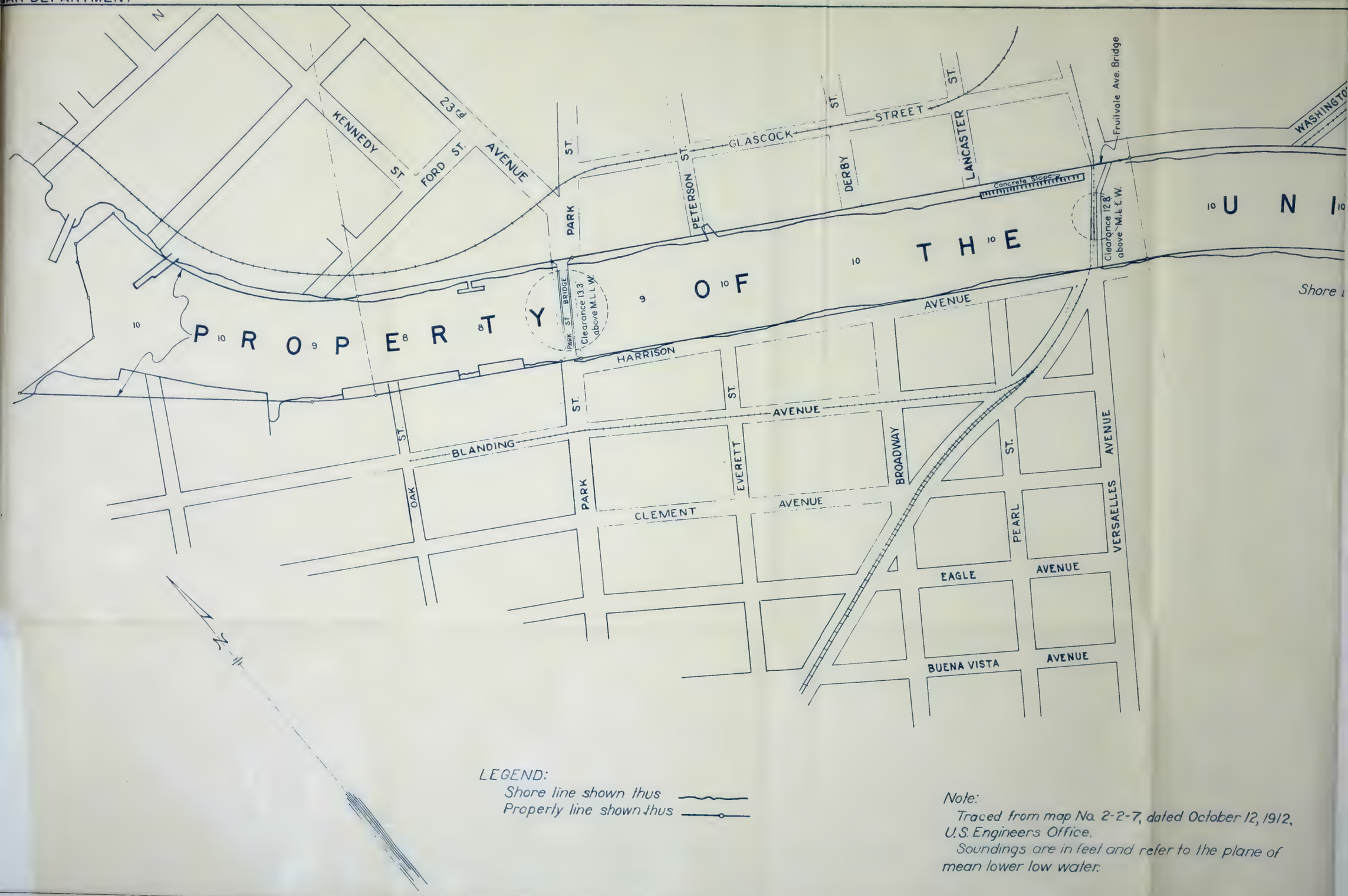
It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all roads now used as public highways, crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the line of said canal.

The description and particular boundaries of said parcel or strip of land hereby ordered to be condemned for the public use and purpose of said tidal canal are as follows towit: [230]

N. HAMILTON,
Judge [236]

EXHIBIT 2

Map of Tidal Canal as of 1909 [237]



LEGEND:
Shore line shown thus
Properly line shown thus

Note:
Traced from map No. 2-2-7, dated October 12, 1912, U.S. Engineers Office.
Soundings are in feet and refer to the plane of mean lower low water.

CORPS OF ENGINEERS, U.S. ARMY



N AVENUE

T E 10 D 9

Line

9

HIGH ST. BRIDGE
Clearance 13.3' above M.L.L.W.

S T A T E S 10

ST.

HIGH

10

9

LINCOLN AVENUE

GARFIELD AVENUE

TIDAL CANAL
OAKLAND HARBOR, CALIF.

IN 2 SHEETS SCALE: 1" = 300' SHEET No. 1

U.S. Engineer Office, San Francisco, California. March 4, 1940

Submitted: Approval Recommended: Approved:

Asst. Engineer Senior Engineer Major, Corps of Engrs. U.S.A.

Drawn By: DJD
Traced By: DJD
Checked By: EAR

DOC. FILE	FILE	DIV.	SHEET
	2	1	90

EXHIBIT 3

RESOLUTION OF BOARD OF SUPERVISORS OF ALAMEDA COUNTY

December 6, 1909 [239]

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA, ACCEPTING PARK STREET, FRUITVALE AVENUE AND HIGH STREET BRIDGES.

Whereas, there exists in the County of Alameda, State of California, over and across the United States Tidal Canal, certain draw bridges commonly known as the Park Street Bridge and Fruitvale Avenue Bridge, and the High Street Bridge, all of which bridges were constructed over said canal by, and belong to, and are the property of, the United States of America; and

Whereas, no provision has ever been made for the operation of said bridges by the United States Government; and

Whereas, that portion of said canal between said bridges has never been open to navigation; and

Whereas, the requirements of commerce and shipping would be materially benefited by the operation of said bridges, and the opening of said canal to navigation in such manner as to permit the passage of vessels in said canal; and

Whereas, Lieutenant Colonel John Biddle, U. S. A., in his report upon the improvement of rivers and harbors in the First San Francisco, California Dis-

tricts, has recommended that the bridges hereinbefore referred to, to-wit, the High Street Bridge, Fruitvale Avenue Bridge and the Park Street Bridge be turned over to the County of Alameda, provided that the County of Alameda thereafter assume all cost of repair, operation and replacement when necessary; and,

Whereas, the Honorable Joseph R. Knowland, Congressman from the Third District of California, has succeeded in securing the recommendation of the War Department that permission be given to turn these bridges over to the County of Alameda; and,

Whereas, the City of Alameda, acting by and through its regularly constituted authorities thereunto duly authorized, has agreed [240] to supply electric power for the operation of said bridges hereinabove referred to for the period of five years, without cost to the said County of Alameda, now, therefore,

Be It Resolved that the County of Alameda, by and through its Board of Supervisors thereunto duly authorized, hereby agrees to accept said bridges, to-wit: The said Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge and to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges, and each of

them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the waterfront of the tidal canal and establish harbor lines so as to permit the construction of wharves and docks; and

Be It Further Resolved that a copy of this resolution be sent by this Board under seal of this Board to United States Senator George C. Perkins, Congressman Joseph R. Knowland, Lieutenant Colonel John Biddle, and to the City Clerk of the City of Alameda.

Passed and adopted by the following vote:

Ayes: Supervisors Bridge, Foss, Mullins and Ch. Honrner 4.

Noes: Supervisors None.

Absent: Supervisor Kelley.

I hereby certify that the foregoing is a true and correct copy of a Resolution adopted by the Board of Supervisors of Alameda, Cal., Monday, December 6th, 1909.

JOHN P. COOK,
County Clerk and Ex-officio Clerk of the Board of Supervisors of Alameda County, Cal.

By H. M. WILSON,
Deputy Clerk. [241]

EXHIBIT 4

LICENSE

September 3, 1910 [242]

J. A. G. O.
(27215)

Whereas, By the Act of Congress approved June 25, 1910, entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes" (Public—No. 264), and under the clause of appropriation therein for "Improving harbor at Oakland, California", it is provided, inter alia, as follows:

> "Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer";

Now, Therefore, Under the authority and discretion in him vested by the above-quoted provision

of said Act of Congress, and in accordance with the recommendation of the Chief of Engineers, United States Army, the Secretary of War hereby grants unto the Board of Supervisors of Alameda County, California, a license, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

This License is granted subject to the following conditions and provisions:

1.—That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any one of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2.—That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3.—That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together [243] with the necessary cables and wiring; furnishing bridge-tenders'

houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4.—That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5.—That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic.

Witness my hand this 3rd day of September, 1910.

(Signed) JOHN C. SCOFIELD
Assistant and Chief Clerk
For the Secretary of War,
in his absence [244]

EXHIBIT 5

RESOLUTION OF BOARD OF SUPERVISORS OF ALAMEDA COUNTY

November 10, 1913 [245]

Introduced by Supervisor.....

At meeting held Nov. 10, 1913.

Whereas, this Board of Supervisors, by resolution heretofore adopted, agreed to accept certain

draw bridges across the United States Tidal Canal in Alameda County, commonly known as the Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge, and assume all costs of future repair, operation and replacement of said bridges, provided that each of said bridges were placed in such condition and repair by the United States Government that said bridges, and each of them, might be operated by electricity, and that the United States should, under such terms and conditions as it might see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks; and

Whereas, subsequent to the adoption of said resolution, and on the 3rd day of September, 1910, the Secretary of War, in accordance with the provisions of an Act of Congress, approved June 28, 1910, entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes" (public No. 264), issued a license to the Board of Supervisors, revocable at will by the Secretary of War, to assume control of the said three bridges built by the United States in connection with the improvement of Oakland Harbor, California, which said license was granted subject to the following conditions and provisions, to-wit:

1. That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic

corporation, and in case two or more such lines or corporations shall desire to use the bridges, of any of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

[246]

2. That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3. That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5. That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic; and

Whereas, the United States has put all three bridges in condition for operation of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished bridge-tenders' houses and highway gates; and, also, overhauled all old machinery and put it in good order for operation, under the new conditions as required by paragraph 3 of said License, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

Be it resolved that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the said three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor, to-wit, the Park Street Bridge, the Fruitvale Avenue Bridge and the High Street Bridge, subject to the conditions and provisions of the aforesaid License of September 3, 1910, said acceptance effective from and after Monday, November 17th, 1913.

Adopted by the following vote:

Ayes: Supervisors Bridge, Foss, Kelley, Murphy and Chairman Mullins—5.

Noes: Supervisors None.

Absent: Supervisors None. [247]

I, John P. Cook, County Clerk, and ex officio Clerk of the Board of Supervisors of Alameda County, State of California, do hereby certify that the foregoing resolution hereunto attached is a true and correct copy of a resolution adopted by said Board of Supervisors of Alameda County, State

of California, on Monday, November 10, A. D., 1913.

JOHN P. COOK,
County Clerk and ex-officio Clerk of the Board of Supervisors of Alameda County, State of California.
By H. M. WILSON,
Deputy Clerk. [248]

EXHIBIT 6

NOTICE OF SEPTEMBER 28, 1939 FROM COUNTY OF ALAMEDA TO UNITED STATES [249]

EXHIBIT 6

County of Alameda

September 28, 1939.

R. C. Hunter
Major, C. E.
District Engineer

In re: The Fruitvale Avenue Bridge and the decision in County of Alameda v. Ross, 97 Cal. App. 166, petition for hearing denied by the Supreme Court of the State of California.

Dear Sir:

As stated in our letter addressed to J. A. Dorst, Lt. Col. C. E. on June 30, 1939, the above decision

holds that the license agreement under which the County is operating the Fruitvale Avenue Bridge is void.

The Board of Supervisors of the County of Alameda has felt that the United States Government should be given a reasonable length of time within which to meet the situation created by this decision. In view of the above mentioned decision, the County cannot continue to operate the Fruitvale Avenue Bridge indefinitely. The Board of Supervisors has accordingly directed me to notify you that at midnight, December 31, 1939, the County of Alameda will cease to operate said bridge.

Respectfully yours

G. E. WADE

County Clerk and Ex-Officio Clerk of the Board of Suvisors of the County of Alameda, State of California

By J. C. HOLLAND

Deputy [250]

EXHIBIT 7

NOTICE OF JULY 27, 1939
FROM
CENTRAL PACIFIC RAILWAY COMPANY
AND SOUTHERN PACIFIC COMPANY
TO
UNITED STATES [251]

Southern Pacific Company
65 Market St., San Francisco

File: G-4179-2
July 27, 1939.

District Engineer,
U. S. War Department,
Custom House,
San Francisco, Calif.

Dear Sir:

The attention of your office has several times been called to the situation of the so-called Fruitvale Avenue Drawbridge between Oakland and Alameda. I call your attention particularly to a formal notice under date of November 26, 1937, signed on behalf of the Central Pacific Railway Company and Southern Pacific Company delivered to your office on December 17, 1937.

We have recently been informed by representatives of the County of Alameda that the County will no longer maintain or operate the drawbridge referred to. This decision on the part of the County appears to be due in large part at least,

to a decision of the District Court of Appeal, Third District of California, under date of April 12, 1939, in proceeding No. 6184—County of Alameda vs Ross, to the effect that the license or agreement which purported to place this drawbridge under the jurisdiction of the County was void, at least so far as the County was concerned, and that the County could not lawfully expend moneys on the bridge.

The railroad portion of this drawbridge is an important artery of commerce, forming the only all-rail connection to the City of Alameda and it is essential that proper steps be taken to renew the bridge within a reasonable time. The Central Pacific Railway Company, successor to Central Pacific Railroad Company, and Southern Pacific Company, its lessee, therefore renew their demand that the U. S. Government comply with the decree in the case of the United States vs Crooks, and others, being case No. 3590, which decree was entered November 4, 1882 and is on file in the office of the County Clerk of Alameda County, Calif. Said decree provides, among other things:

> "* * * that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same * * * and also suitable railroad bridges on the present railroad tracks crossing the line of said canal."

You are therefore again called upon to cause this drawbridge to be inspected, maintained and re-

viewed, so that the public service of said bridge will not be interrupted.

CENTRAL PACIFIC RAILWAY COMPANY
SOUTHERN PACIFIC COMPANY
By E. J. FOULDS
Their Attorney

[Endorsed]: Filed March 21, 1940. [252]

[Title of District Court and Cause.]

STIPULATION OF FACTS WITH REFERENCE TO OFFER OF EVIDENCE BY DEFENDANT, COUNTY OF ALAMEDA, SUBJECT TO OBJECTION OF PLAINTIFF AS TO MATERIALITY

It is hereby stipulated by and between the parties hereto by their respective attorneys, that the following facts are true, subject to objection by plaintiff, United States, as to materiality:

I.

That Major G. H. Mendell, Major of Engineers of the United States Army, was a witness for the United States Government in the case of United States vs. Crooks, et al, and testified with reference to the Report of the Board of Engineers of the United States Army made to Brigadier-General A. A. Humphreys, Chief of Engineers of the United States Army, with reference to San Antonio Creek, dated February 16, 1874; that he testi-

fied also at said trial of United [253] States vs. Crooks, et al, as to the plans and purposes of the construction of the Tidal Canal for which the land described in the Complaint in said action was to be condemned; that said Major G. H. Mendell was the same party whose name was subscribed to the said report of February 16, 1874, above mentioned, a copy of which is attached to the "Stipulation of Facts with reference to offer of evidence by plaintiff, subject to objection of defendant, County of Alameda, as to materiality", on file in the case at bar.

II.

With the exception of the omission of the Report of the Board of Engineers of the United States Army with reference to San Antonio Creek, San Francisco Bay, California, dated February 16, 1874, the exhibit hereto attached marked Exhibit 1, and by reference incorporated herein, is a true and correct copy and transcription of the testimony of said Major G. H. Mendell. The said Report of February 16, 1874, is omitted from said Exhibit 1 in the interest of brevity and because the same report is attached to Exhibit 1 of a "Stipulation of Facts with reference to offer of evidence by plaintiff, subject to objection of defendant, County of Alameda, as to materiality," on file in the case at bar.

III.

That the proposed dam across the mouth of San Leandro Bay, referred to in said Report, or any

dam in connection with the waters referred to in the Report, was never built.

Dated: March 21, 1940.

FRANK J. HENNESSY,
United States Attorney
W. E. LICKING,
Assistant United States Attorney
BRICE TOOLE,
Attorney, Department of Justice,
Attorneys for Plaintiff [254]

E. J. FOULDS,
Attorney for Defendants, Southern Pacific Company and Central Pacific Railway Company.
RALPH E. HOYT,
District Attorney for the County of Alameda, State of California,
by J. F. COAKLEY,
Chief Assistant District Attorney for the County of Alameda, State of California,
ROBERT H. McCREARY,
Deputy District Attorney for the County of Alameda, State of California,
Attorneys for Defendant, County of Alameda.

[255]

EXHIBIT 1.

In the Superior Court of the County of Alameda, State of California.

THE UNITED STATES,

Plaintiff,

vs.

M. CROOKS, et al.,

Defendants.

STATEMENT ON MOTION FOR A NEW TRIAL ON BEHALF OF DEFENDANT ALFRED A. COHEN.

This cause came on to be tried in the Superior Court of the County of Alameda, State of California, in Department No. 3 thereof on the 10th day of November A. D. 1881. Walter Van Dyke Esq., appearing for plaintiff and defendant Alfred A. Cohen Esq., for himself and other Defendants in the cause. Whereupon it was expressly stipulated in open court and entered upon the minutes, that a jury be waived and that the action be tried by the Court without a jury.

The following were the proceedings had on said trial.

GEORGE H. MENDELL

was called as a witness on behalf of plaintiff, and testified as follows:

I am an Engineer in the service of the United States, and I have [256] charge of the improvement of Oakland Harbor.

Q. What have been the steps taken by you as engineer with reference to the Oakland Harbor from the beginning?

Mr. Cohen: We object to the question on the ground of irrelevancy, immateriality and incompetency, and not the best evidence. The Court overruled the objection, and defendant then and there duly excepted to the ruling of the Court.

Exception No. 1

Thereupon the witness answered as follows:

The first connection that I had with the subject after 1873, was as a member of the Board of Engineers, which was composed of General Alexander, Colonel Stewart and myself, to whom the Secretary delegated the requirements of the Bill of 1873. That Board under these instructions made surveys with regard to the improvement of this Harbor.

I have not got the order from the Secretary of War. It is a printed order in the usual form. That Board prepared a report which was submitted to General A. A. Humphreys, Chief of Engineers in February 1874. That report has been printed. I have a copy of it, it is dated February 1874. The Board reported to the Chief of Engineers one of the Bureaus of the War Department having charge of the work.

Plaintiff here offered in evidence a printed copy of said report of which the following is a copy:

(This report is not included here because a true and correct copy of the same is attached to "Stipulation of Facts With Reference to

Offer of Evidence by Plaintiff, Subject to Objection of Defendant, County of Alameda, As to Materiality," and reference is hereby made to said copy of said report as included in said Stipulation.)

To the introduction of which report in evidence defendant then and there objected on the ground of its irrelevancy, immateriality and [257] incompetency, but not on the ground of its being simply a copy: which said objection the Court overruled and to such ruling of the Court this defendant then and there duly excepted. Said Report was then marked "Plaintiff's Exhibit A" and read in evidence.

Exception No. 2

The Witness continuing stated that in March 1874, he was in Washington and appeared before a Committee of Congress with reference to this matter—the Committee of Commerce of the House that made recommendations for improvements of harbors. The report was then before this Committee and he was examined by the Committee in reference to it. It was sometime the latter part of March 20th or 25th—General Alexander also appeared with him. The report recommended this canal would say that in reference to that that the canal is one of the essential parts of the project and is set forth in the report. In July 1874, Congress having made an appropriation he was assigned by the War Department to the construction of this work.

Q. Was that under direction of the Secretary of War?

A. Yes sir. I have a letter from the Chief of Engineers assigning me to that department.

Mr. Van Dyke: If you have no objection I will submit that as an original.

Mr. Cohen: I would like to have it appear on the record that all this testimony is taken subject to my objection. But these copies are received with the same force and effect as the originals if produced here.

The Court: Yes Sir.

The foregoing letter was then read in evidence.

The witness then stated that shortly after he was assigned to this work in the next spring he had a survey made of the land lying between the head of San Antonio Creek and San Leandro Bay with a view of getting the location of this land and the metes and bounds. Having [258] obtained that map in the summer of 1875, he then drew out the line of this canal on this map after an examination of the ground. Previous to that time August 13th 1875, he wrote a letter to the department (his own department) in which he called attention to the necessity of acquiring title to this land and asked that the Attorney General be authorized to begin proceedings for that purpose. In reply to that he received a letter which purports to be a letter from the department to the Secretary of War which was furnished by his own department for his information.

Q. Was this endorsement on it? "Office of Chief of Engineers September 3rd 1874, copy respectfully furnished Major G. H. Mendell Corps of Engineers

for his information by command of Brig. Gen'l Humphreys John G. Park Major of Engineers?"

A. It is an indorsement on it. It ought to be 1875. (Witness reading) "Copy respectfully furnished for his information John G. Park Chief of Engineers." That is his signature.

Mr. Van Dyke: This is a copy of a letter to the War Department from the Chief of Engineers. It was endorsed by him and sent to Colonel Mendell for his use.

Witness: It was from the Attorney General to the War Department. It was sent to me as a reply to my letter showing that my recommendations were carried out. It belongs to my files—It was offered as

PLAINTIFF'S EXHIBIT "B"

and the following is a copy—

August 31st, 1875

Department of Justice
Hon. W. W. Belknap,
Secretary of War
Sir.

I have the honor to acknowledge the receipt of a letter from your department dated 28th, inst. requesting instructions to the United States Attorney for California to aid Major Mendell in obtaining the condemnation of certain land required for a part of [259] the canal which is to connect the San Antonio and San Leandro Estuaries in connection with the improvement of Oakland Harbor California. In compliance with your request I have this

day given to Walter Van Dyke Esq., United States Attorney at San Francisco instructions to render the required legal assistance.

Very Respectfully your obedient servant,
S. F. PHILLIPS,
Acting Attorney General.

To the introduction of which letter in evidence defendant then and there objected on the ground of its irrelevancy, immateriality and incompetency, but not on the ground of its being a copy which said objections the Court overruled and defendant then and there duly excepted to such ruling—, and the said letter marked Plaintiff's Exhibit "B" was then read in evidence.

Exception No. 3

Mr. Van Dyke: In this connection I submit a letter of the Attorney General directed to the United States Attorney here in California, I will have this copied and marked and Mr. Cohen agrees to receive it as the original is itself on file.

The paper is marked

PLAINTIFF'S EXHIBIT "C"

and the enclosures are marked

PLAINTIFF'S EXHIBIT "C1"

and

PLAINTIFF'S EXHIBIT "C2"

copies of which are as follows:

Department of Justice.
Washington, August 31st, 1875.

Walter Van Dyke Esq.,
United States Attorney.
San Francisco, California.
Sir.

You will find enclosed herewith copies of letters from General A. A. Humphreys, Chief of Engineers, and from the Acting [260] Chief Clerk of the War Department, in which the request is made that legal assistance be given to Major Mendell in the condemnation of certain land for a part of the canal which is to connect the San Antonio and San Leandro Estuaries in connection with the improvement of Oakland Harbor, California. You are hereby instructed, in accordance with the request, to render the requisite legal advice and assistance.

Very Respectfully,
S. F. PHILLIPS,
Acting Attorney General.

Office of Chief of Engineers,
Washington, D.C. Aug. 26, 1875.

Hon. W. W. Belknap.
Secretary of War.
Sir.

The plan of improvement of Oakland Harbor, California, which is now in process of execution, contains as one of its essential parts, the excavation

of a canal to connect the San Antonio and San Leandro estuaries and inasmuch as legal proceedings will be necessary to secure the title to a part of the land to be occupied by this canal, I beg leave to ask that the Attorney General be requested to instruct the United States District Attorney at San Francisco to aid Major Mendell, Corps of Engineers, in charge of that improvement, in obtaining such land by condemnation.

Very respectfully,
Your obedient servant,
A. A. HUMPHREYS,
Brig. Gen. and Chief of
Engineers. [261]

War Department.
Washington City.

August 28th, 1875.

To the Honorable,
The Attorney General,
Sir:

I have the honor to transmit, herewith, copy of a letter of the 26th inst., from the Chief of Engineers, asking that the United States Attorney at San Francisco be instructed to aid Major Mendell in obtaining by condemnation the land required for a part of the canal which is to connect San Antonio and San Leandro estuaries, in connection with the

improvement of Oakland Harbor, California, and to request that the desired aid may be afforded.

Very respectfully,
Your obedient servant,
WM T. BARNARD,
Acting Chief Clerk
For the Secretary of War,
in his absence.

To the introduction of which letters marked Plaintiff's Exhibit "C", Plaintiff's Exhibit "C1" and Plaintiff's Exhibit "C2" in evidence defendant then and there objected on the ground that they and each of them were irrelevant, immaterial and incompetent but not on the ground of the said Exhibits being copies.—Which said objections the Court overruled and defendant then and there duly excepted. It is admitted that April 1st 1876 the United States Attorney of this State informed the Attorney General that in pursuance of his instructions he had instituted such proceedings in the 3rd Judicial District of this State. [262]

Exception No. 4.

The Witness then stated that he had a survey made of this canal.

Mr. Van Dyke: In your report you stated the necessity of that as part of the improvement?

A. I so regarded it. Yes sir.

Q. What is the use of it?

A. To increase the tidal prism or in more familiar language to increase the tidal water which will pass between the training walls.

The Court: Q. Does that tend to increase the volume of water.

A. Yes Sir: The harbor has been a good deal injured by taking Lake Merritt and segregating that, so that the harbor can receive no benefit from it. For the purpose of restoring this harbor and increasing its depth, it has been thought necessary and I believe it to be necessary to introduce more water than exists in Oakland Harbor. And that can be done by making this connection.

The Witness stated that the length of this canal will be about a mile, 400 feet wide at the top and at the bottom somewhere in the neighborhood of 300 feet, and the depth will be about 8 feet at low water.

That in locating the canal he endeavored to locate the line of it on the least valuable of the country as conformable to the necessary condition to give it the necessary debauche at each of the ends; and in so doing do the least injury to private property.

Q. And you did that?

A. That is my judgment.

Q. Then the lines of this canal—does it carry any improvements—what is the nature of the ground in the line of this canal, is it improved or otherwise?

A. The time I last was there, there was no improvements about as little as any lands about here. It is nearly all marsh land and formerly—there are

evidences of two old sloughs one making from [263] San Leandro Bay and one from San Antonia Creek and probably there was one that connected there; and I followed the course of them as far as I could—I had soundings made to see what the excavations would be.

Q. Mr. Glascock: You propose as I understand to have it 8 feet below low water mark?

A. Yes Sir.

Q. Do you propose it for navigable purposes?

A. Yes Sir.

Q. What would be about the speed of the current.

A. That would be regulated according to the details of the work which we decide on towards the end. The project has never been worked out in all its details—two or three miles an hour.

Cross Examination.

Q. Mr. Cohen: What would be the effect of turning the water of Lake Merritt back into the Estuary of San Antonia as it originally flowed?

A. It would be a benefit to increase the water flow——

Q. Would it not answer the same purpose, of digging this canal?

A. It would tend in the same direction.

Q. Do you think that the land through which this canal is to be constructed would be benefited by the canal?

A. I don't see why it wouldn't be; that is the

adjoining parts of it. That would be my opinion. I am not versed in real estate though.

Q. Are you acquainted with General Alexander?

A. Yes Sir, he is the person named in the Petition here as one of the Defendants, B. S. Alexander.

Q. You spoke of Colonel Stewart is he the person here named C. L. Stewart? [264]

A. Yes Sir:

Q. And George H. Mendell is yourself?

A. Yes Sir and I own five acres of land—I am a co-owner in that land with Mr. Cohen——

Q. Has there been any arrangement made, any authority given you to proceed with this work and take the land and its uses as you claim? Has any arrangement been made for taking the debris from the intercepting streams?

A. We will take care of it sir when we do the work.

Q. Has any arrangement been made for bridging, the cross streets or highways?

A. I don't know what you mean by arrangements. There are no arrangements by way of plans—The report as shown in Exhibit "A" the matter of bridges is alluded to in a way. I would expect to build bridges over all streets when the work was executed.

Q. Take the property in which I am specially interested in which I appear for myself, which is marked on the plan of your canal as property belonging to myself at the junction of Fruitvale Road—you know where that is?

A. Yes Sir—I have been there, It is on that map. If there is any particular point I can refer to it.

Q. Does your plan contemplate—are you authorized by any authority of the United States to build a bridge at the junction of Fruitvale road to connect my land with the main land if the canal is constructed.

A. I have no authority to do it—I have no authority to build that canal, but I should consider it a proper thing to do, and as far as my recommendation went I would have bridges built on the highways——

Q. Would you consider it a proper subject to be considered in assessing the damage done to the property? [265]

A. Yes Sir I suppose so. I don't know what would be a proper subject to consider——

Q. The effect of your Canal would be to leave my property an island?

A. Yes Sir: A very large island.

Q. It would be an island?

A. All of Alameda.

Q. You expect Colonel Mendell to make this a navigable Canal. Do you intend to make the bridges across the canal draw bridges?

A. I suppose so. It would not be navigable without it Sir.

Q. It was admitted that Joseph R. Mauran would testify that the large map, produced properly designated the natural objects on the ground and

correctly showed the areas and boundaries of the several tracts of land——

The Plaintiff then rests—Thereupon defendant moved the Court for an order nonsuiting the plaintiff on the ground—

First. That the United States Government has not authorized the taking of the private property described in and for the uses mentioned in the complaint.

Second. That no authority of law has been shown authorizing the District Attorney of the United States to institute in the name of the United States these proceedings for the condemnation of the lands described in the complaint herein.

The said motion was by the Court denied, and to such ruling, denying said motion defendant then and there duly excepted.

Exception No. 5.

(Thereafter witnesses were called by the defense and plaintiff with reference to the value of the land involved in the suit and with reference to severance damages and damages or benefits as a result of the construction of the improvement.)

[Endorsed]: Filed March 21, 1940. [266]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 22nd day of March, in the year of our Lord one thousand nine hundred and forty.

Present: the Honorable Harold Louderback,
District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, ET AL.

Attorneys herein and the parties hereto being present as heretofore the further trial of this case was thereupon resumed. Henry S. Pound was recalled and testified on behalf of the plaintiff. Plaintiff rested. Evan J. Foulds was sworn and testified on behalf of the defendants, Southern Pacific Co., and Central Pacific Railway Co., and said defendants rested. After hearing attorneys, it is Ordered that the motion of the defendant County of Alameda for admission into evidence of stipulation be submitted on briefs to be filed in 5, 2 and 1 days, and that thereafter, upon the Court giving its ruling upon said motion, the issues of the case be

submitted upon briefs to be filed in 2, 10 and 10 days; said time to commence and run from and after date of notice to attorneys of the ruling upon the motion to admit exhibit in evidence. [267]

[Title of District Court and Cause.]

STIPULATION OF FACTS WITH REFERENCE TO OFFER OF EVIDENCE BY DEFENDANT, COUNTY OF ALAMEDA, SUBJECT TO OBJECTION OF PLAINTIFF AS TO MATERIALITY.

It is hereby stipulated by and between the parties hereto by their respective attorneys, that the following facts are true, subject to objection by plaintiff, United States, as to materiality:

I.

That Major G. H. Mendell, also known as George H. Mendell, Major of Engineers of the United States Army, referred to in the "Stipulation of Facts with Reference to Offer of Evidence by Defendant, County of Alameda, Subject to Objection of Plaintiff as to Materiality" on file herein, was deceased prior to the commencement of this proceeding, and, during his lifetime, was the same party named as a defendant in the case of United States vs. Crooks, et [268] al.

Dated: March 25, 1940.

FRANK J. HENNESSY,
United States Attorney
W. E. LICKING,
Assistant United States Attorney
BRICE TOOLE,
Attorney, Department of Justice,
Attorneys for Plaintiff
E. J. FOULDS,
Attorneys for Defendants, Southern Pacific Company and Central Pacific Railway Company.
RALPH E. HOYT,
District Attorney for the County of Alameda, State of California,
by J. F. COAKLEY,
Chief Assistant District Attorney for the County of Alameda, State of California
ROBERT H. McCREARY,
Deputy District Attorney for the County of Alameda, State of California,
Attorneys for Defendant, County of Alameda.

[Endorsed]: Lodged March 26, 1940 and motion to admit in evidence submitted. Harry L. Fouts, Deputy Clerk. [269]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States Circuit Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 26th day of March, in the year of our Lord one thousand nine hundred and.....

Present: the Honorable Harold Louderback,
District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, ET AL.

Robert H. McCreary, Esq., Deputy District Attorney for the County of Alameda, came into Court and presented a stipulation of facts with reference to offer of evidence by the defendant County of Alameda, and moved that same be filed and admitted in evidence in this case, and it is Ordered that the said motion to admit same in evidence and the objection of William E. Licking, Esq., Assistant U. S. Attorney, to said admission, be and the same are hereby submitted. [270]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 3rd day of April, in the year of our Lord one thousand nine hundred and forty.

Present: the Honorable Harold Louderback,
District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

STATE OF CALIFORNIA, Etc.

Upon motion of William E. Licking, Esq., Assistant U. S. Attorney, it appearing that all briefs have been filed, it is Ordered that the motion to introduce certain exhibits into evidence be and the same is hereby submitted. [271]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 10th day of April, in the year of our Lord one thousand nine hundred and forty.

Present: the Honorable Harold Louderback,
District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, Etc.

The motion to receive into evidence in this case, the testimony of Major Mendell given in the case of United States vs. Crooks, which was decided by the Superior Court of Alameda County, California in 1882, and numbered 3590, having been heretofore heard and submitted, it is Ordered that the said motion be and the same is hereby denied. [272]

[Title of District Court and Cause.]

NOTICE

To Frank J. Hennessy, Esq.,
U. S. Attorney,
Post Office Building,
San Francisco, California.

Ralph E. Hoyt, Esq.,
District Attorney, Alameda County,
New Court House,
Oakland, California.

E. J. Foulds, Esq.,
Legal Department,
65 Market Street,
San Francisco, California.

You Are Hereby Notified that on April 10th, 1940, Judge Harold Louderback Ordered that the motion to receive into evidence in the above case, testimony of Major Mendell given in the case of U. S. v. Crooks, etc., be and is hereby Denied.

WALTER B. MALING,
Clerk. (a)

San Francisco, California, April 11th, 1940. [273]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 27th day of June, in the year of our Lord one thousand nine hundred and forty.

Present: the Honorable Harold Louderback,
District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, et al.

This case came on regularly for argument of the issues herein, the same were argued by attorneys for the parties, and it is Ordered that this case be and the same is hereby submitted. [274]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof,

in the City and County of San Francisco, on Tuesday, the 9th day of July, in the year of our Lord one thousand nine hundred and forty.

Present: the Honorable Harold Louderback,
District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, Etc.

This case having been heretofore heard and submitted, it is Ordered that Judgment be entered for the plaintiff upon findings of fact and conclusions of law, together with costs. [275]

[Title of District Court and Cause.]

NOTICE

To Ralph E. Hoyt, Esq.,
District Attorney, Alameda County,
Court House Building,
Oakland, California.

Frank J. Hennessy, Esq.,
United States Attorney,
Post Office Building,
San Francisco, California.

E. J. Foulds, Esq.,
65 Market Street,
San Francisco, California.

You Are Hereby Notified that on July 9th, 1940, Judge Harold Louderback Ordered that Judgment

be entered in favor of Plaintiff, upon findings of fact and conclusions of law to be filed, together with costs.

WALTER B. MALING,
Clerk. (a)

San Francisco, California, July 10th, 1940. [276]

In the Southern Division of the United States District Court for the Northern District of California.

No. 21467-L

UNITED STATES OF AMERICA,
Plaintiff,

vs.

COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Political Subdivision of the State of California), CENTRAL PACIFIC RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause heretofore came on duly and regularly for trial and hearing before this Court, sitting without a jury; Messrs. Frank J. Hennessy, United States Attorney, W. E. Licking, Assistant United States Attorney, and Brice Toole,

Attorney, Department of Justice, appearing for the plaintiff, and Messrs. Ralph E. Hoyt, District Attorney, J. F. Coakley, Assistant District Attorney, and Robert H. McCreary, Assistant District Attorney, appearing for the defendant County of Alameda, and Mr. E. J. Foulds, appearing for the defendants Central Pacific Railway Company, and Southern Pacific Company; both oral and documentary evidence having been introduced at the trial thereof, on behalf of the respective parties hereto, and the evidence being closed, and the cause submitted to this Court for its decision and determination, and the Court being duly advised in the premises, finds the following facts: [277]

FINDINGS OF FACTS

I.

The plaintiff is the United States. The County of Alameda was at all times herein mentioned, and now is a body corporate and politic, and a political subdivision of the State of California. The Central Pacific Railway Company, and the Southern Pacific Company are private corporations, duly authorized and licensed to do business within the State of California, and are engaged in the business of operating railroad lines within and without said State and are the owners of, or claim some interest in, certain railway rights of way within the said County of Alameda in or over the Tidal Canal described hereafter, and more particularly in, over

and upon the Fruitvale Avenue Bridge hereinafter mentioned.

II.

The City of Alameda and the City of Oakland are both situated upon the east shore of San Francisco Bay, a navigable body of water. Both said cities are located within Alameda County, State of California, and are separated from each other by a navigable body of water known at various times and in various quarters by the following names: San Antonio Estuary, Oakland Estuary, Oakland Harbor, Inner Harbor and Tidal Canal and Alameda Estuary. Said body of water is roughly seven miles in length, extending in a general east and west direction from San Leandro Bay, an arm of San Francisco Bay, on the east, to another point in San Francisco Bay proper at the end of the moles of the Southern Pacific Railroad Company and the Western Pacific Railroad Company on the west. Said Estuary constitutes [278] what is commonly known as Oakland's inner harbor; the outer harbor extending in a northeasterly direction for about two miles from the entrance to the inner harbor. The westerly end of the Estuary, for a distance of about two miles, is an entrance channel, protected by stone retaining walls on either side. Said entrance channel varies from Seven Hundred and Fifty to Eight Hundred and Fifty feet in width. Immediately east of said entrance channel lies the main portion of the inner harbor, with docking facilities; the width of the channel here being Six Hundred feet, and the nat-

ural harbor varying from Six Hundred and Fifty feet at the narrowest points to about Three Thousand Five Hundred Feet at the easterly end where the harbor widens to form what is known as Brooklyn Basin.

Easterly of Brooklyn Basin and forming a continuous part of the same body of water is the "Tidal Canal" nearly two miles in length connecting the inner harbor with San Leandro Bay. Said Tidal Canal was originally dredged by the United States to turn the water from San Leandro Bay or estuary through a tidal canal into the head of San Antonio estuary, so as to increase the tidal flow into and through said San Antonio estuary, for the purpose of removing the sediment from the same.

III.

In the year 1874 Congress enacted the Rivers and Harbors Act for that year, in which the sum of $100,000 was appropriated "for the improvement of Oakland harbor;" (18 Stat. 237, c. 457) to be expended under the direction of the Secretary of War.

In 1876 the United States instituted a condemnation proceeding in the District Court of the Third Judicial District in and for [279] the State of California (now the Superior Court of the State of California, in and for the County of Alameda) to acquire a right of way for the said Tidal Canal, said action being entitled The United States, plaintiff, v. Crooks, County of Alameda, Central Pacific Railroad Company, et al, defendants, action No.

3590 in the records of the County Clerk of the County of Alameda for the District Court of the Third Judicial District, the State of California, in and for the County of Alameda.

IV.

In said suit the County of Alameda and the Central Pacific Railroad Company were named, among others, as defendants and the United States sought to condemn the rights of the County and of the railroad in certain highways and railroad rights of way which crossed the proposed Tidal Canal at the places where the Fruitvale Avenue, High and Park Street bridges are now located, and at Washington Avenue, where a railroad right of way was then located. The right of way and tracks of the Central Pacific Railroad Company, which crossed the proposed Tidal Canal at Fruitvale Avenue, paralleled and adjoined the right of way of the county road belonging to the defendant, County of Alameda, which also crossed the proposed Tidal Canal at Fruitvale Avenue.

The County of Alameda and the railroad company asked for no damages in said condemnation proceedings, and in the decree in said action hereinabove referred to, it was provided, among other things:

> "Defendants, the County of Alameda, The Central Pacific Railroad Company, Charles Heinecke and S. A. Smith, not having claimed damages, no damages are awarded to them.

[280]

"It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the lines of said canal."

V.

After said decree of condemnation, the United States constructed said Tidal Canal and constructed, and until November 17, 1913, maintained and operated highway drawbridges at Park Street and High Street, and a combination railroad, vehicular and pedestrian drawbridge at Fruitvale Avenue. The Park Street Bridge was completed in 1891; the High Street and Fruitvale Avenue Bridges were completed in 1901 and said construction of said Tidal Canal was completed in 1903.

The bridges were constructed as drawbridges of the swing type, turning or pivoting horizontally upon central piers, and were equipped with hand-operated machinery. It took approximately thirty minutes to open and thirty minutes to close each of these bridges. After these bridges were equipped with electrical operating machinery, as hereinafter set forth, it took from two to three minutes to open, and the same time to close each of said bridges.

Prior to said installation of electrical operating machinery the United States did not regularly

operate said bridges, but did, on occasions, open and close them on request of private interests for the passage of vessels; private interests on occasions also opened and closed said bridges on their own responsibility for the passage of vessels which could not clear said bridges when closed; [281] and boats, barges and scows which could clear said bridges when closed plied up and down said Tidal Canal. The Tidal Canal was not open to navigation.

VI.

Prior to the institution of said condemnation proceedings the Central Pacific Railroad Company (predecessor of defendant Central Pacific Railway Company) was the owner of two lines of railroad extending across the lands sought to be condemned. One line of said railroad was on or adjoining Fruitvale Avenue, and the other line was on or adjoining Washington Avenue, across the site of the proposed Tidal Canal, in said Alameda County, and the said Central Pacific Railroad Company was the owner of rights of way in said two lines of railroad, and was a party defendant in said condemnation proceedings.

VII.

On March 7, 1901, an agreement in writing was entered into between the United States, Central Pacific Railway Company (said Central Pacific Railway Company having succeeded to the interest of said Central Pacific Railroad Company) and the Southern Pacific Company (lessee of Central Pa-

cific Railway Company), under which agreement the Central Pacific Railway Company in consideration of $50,000 agreed to abandon its line of railroad on or adjoining Washington Avenue, and to relieve the United States of any obligation to construct or maintain a drawbridge across said Tidal Canal [282] at Washington Avenue. The defendant railroad companies claim no right or title in the Fruitvale Avenue bridge except those rights conferred upon them, or their predecessors, by the decree in United States v. Crooks et al.

VIII.

On December 6, 1909, the Board of Supervisors of Alameda County adopted a Resolution as follows:

"RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA, ACCEPTING PARK STREET, FRUITVALE AVENUE AND HIGH STREET BRIDGES.

"Whereas, there exists in the County of Alameda, State of California, over and across the United States Tidal Canal, certain draw bridges commonly known as the Park Street Bridge and Fruitvale Avenue Bridge, and the High Street Bridge, all of which bridges were constructed over said canal by, and belong to, and are the property of, the United States of America; and

Whereas, no provision has ever been made for the operation of said bridges by the United States Government; and

Whereas, that portion of said canal between said bridges has never been open to navigation; and

Whereas, the requirements of commerce and shipping would be materially benefited by the operation of said bridges, and the opening of said canal to navigation in such manner as to permit the passage of vessals in said canal; and

Whereas, Lieutenant Colonel John Biddle, U. S. A., in his report upon the improvement of rivers and harbors in the First San Francisco, California Districts, has recommended that the bridges hereinbefore referred to, to-wit, the High Street Bridge, Fruitvale Avenue Bridge and the Park Street Bridge be turned over to the County of Alameda, provided that the County of Alameda thereafter assume all cost of repair, operation and replacement when necessary; and

Whereas, the Honorable Joseph R. Knowland, Congressman from the Third District of California, has succeeded in securing the recommendation of the War Department that permission be given to turn these bridges over to the County of Alameda; and [283]

Whereas, the City of Alameda, acting by and through its regularly constituted authorities thereunto duly authorized, has agreed to supply electric power for the operation of said bridges

hereinabove referred to for the period of five years, without cost to the said County of Alameda, now, therefore,

Be It Resolved that the County of Alameda, by and through its Board of Supervisors thereunto duly authorized, hereby agrees to accept said bridges, to-wit: The said Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge and to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges, and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the waterfront of the tidal canal and establish harbor lines so as to permit the construction of wharves and docks; and

Be It Further Resolved that a copy of this resolution be sent by this Board under seal of this Board to United States Senator George C. Perkins, Congressman Joseph R. Knowland, Lieutenant Colonel John Biddle, and to the City Clerk of the City of Alameda.

Passed and adopted by the following vote:

Ayes: Supervisors Bridge, Foss, Mullins and Ch. Honrner 4.

Noes: Supervisors None.

Absent: Supervisors Kelley.

I hereby certify that the foregoing is a true and correct copy of a Resolution adopted by the Board of Supervisors of Alameda, Cal., Monday, December 6th, 1909.

JOHN P. COOK,
County Clerk and Ex-officio Clerk of the Board of Supervisors of Alameda County, Cal.
By H. M. WILSON,
Deputy Clerk." [284]

IX.

On September 3, 1910, the Secretary of War issued a license to the County of Alameda as follows:

"J. A. G. O.
(27215)

"Whereas, By the Act of Congress approved June 25, 1910, entitled 'An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes' (Public—No. 264), and under the clause of appropriation therein for 'Improving harbor at Oakland, California', it is provided, inter alia, as follows:

'Provided further, that the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of

the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, that of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer';

Now, Therefore, under the authority and discretion in him vested by the above-quoted provision of said Act of Congress, and in accordance with the recommendation of the Chief of Engineers, United States Army, the Secretary of War hereby grants unto the Board of Supervisors of Alameda County, California, a License, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

This License is granted subject to the following conditions and provisions:

1.—That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or coporations shall desire to use the bridges, or any one of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2.—That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3.—That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4.—That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5.—That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic.

Witness my hand this 3rd day of September, 1910.

(Signed) JOHN C. SCOFIELD
Assistant and Chief Clerk
For the Secretary of War,
in his absence."

X.

On November 10, 1913, the Board of Supervisors of Alameda County adopted a Resolution as follows:

"RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA.

Introduced by Supervisor.....

at Meeting Held Nov. 10, 1913.

"Whereas, This Board of Supervisors, by resolution heretofore adopted, agreed to accept certain draw bridges across [286] the United States Tidal Canal in Alameda County, commonly known as the Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge, and assume all costs of future repair, operation and replacement of said bridges, provided that each of said bridges were placed in such condition and repair by the United States Government that said bridges, and each of them, might be operated by electricity, and that the United States should, under such terms and conditions as it might see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks; and

Whereas, subsequent to the adoption of said resolution, and on the 3rd day of September, 1910, the Secretary of War, in accordance with the provisions of an Act of Congress, approved

June 25, 1910, entitled 'An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes' (public No. 264), issued a license to the Board of Supervisors, revocable at will by the Secretary of War, to assume control of the said three bridges built by the United States in connection with the improvement of Oakland Harbor, California, which said license was granted subject to the following conditions and provisions, to-wit:

1. That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2. That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3. That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical power, furnish-

ing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions. [287]

4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5. That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic; and

Whereas, the United States has put all three bridges in condition for operation of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished bridge-tenders' houses and highway gates; and, also, overhauled all old machinery and put it in good order for operation, under the new conditions as required by paragraph 3 of said License, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

Be It Resolved that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the said three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor, to-wit, the Park Street Bridge, the Fruitvale Avenue Bridge and the High Street Bridge, subject to the conditions and provisions of the aforesaid License of September 3, 1910, said acceptance being effective from and after Monday, November 17th, 1913.

Adopted by the following vote:

Ayes: Supervisors Bridge, Foss, Kelley, Murphy and Chairman Mullins—5.

Noes: Supervisors None.

Absent: Supervisors None.

I, John P. Cook, County Clerk, and ex-officio Clerk of the Board of Supervisors of Alameda County, State of California, do hereby certify that the foregoing resolution hereunto attached is a true and correct copy of a resolution adopted by said Board of Supervisors of Alameda County, State of California, on Monday, November 10, A. D. 1913.

JOHN P. COOK,
County Clerk and ex-Officio Clerk of the Board of Supervisors of Alameda County, State of California.

By H. M. WILSON,
Deputy Clerk." [288]

XI.

On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made available to adjacent property owners, a twenty-five foot strip of property along each side of the Canal for the construction of wharves and warehouses.

XII.

Thereafter the said bridges were operated, repaired and maintained at the expense of said County and have been so repaired, maintained and operated except that the bridges at Park Street and High Street have been reconstructed and are now operated, repaired and maintained under other arrangements between the United States and said County which are of no significance to the present case.

XIII.

The total cost to the United States for the repair and electrification of said Fruitvale Avenue, High Street and Park Street Bridges was $21,358.80.

The annual cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge commencing during the fiscal year 1913-1914 to and including the fiscal year 1938-39 is hereinafter set forth. The annual costs paid by the County of Alameda for maintaining and operating the High Street and Park Street Bridges commencing during the fiscal year 1913-14 to the respective fiscal year of commencement of reconstruction of the High Street and Park Street Bridges are also set forth as follows: [289]

Fiscal Year	Fruitvale Avenue Bridge	High Street Bridge	Park Street Bridge
1913-14	$ 1,937.84	$ 1,875.48	$ 2,891.21
1914-15	11,842.51	14,146.76	9,684.14
1915-16	3,078.39	2,344.54	4,078.73
1916-17	4,072.45	3,953.74	2,840.85
1917-18	5,075.85	2,826.06	6,224.64
1918-19	6,949.80	6,652.10	10,153.72
1919-20	7,812.75	9,769.53	10,357.54
1920-21	18,465.73	6,103.83	9,167.29
1921-22	6,671.50	6,884.75	13,644.52
1922-23	7,215.71	6,796.90	13,503.47
1923-24	6,331.12	14,406.92	8,048.20
1924-25	7,558.69	9,940.27	7,466.12
1925-26	10,037.87	6,832.69	9,972.74
1926-27	8,322.69	7,485.69	7,856.16
1927-28	7,751.94	9,690.75	13,502.22
1928-29	9,888.50	10,965.56	21,003.10
1929-30	12,797.87	22,319.42	10,116.56
1930-31	29,738.53	13,150.53	12,766.64
1931-32	13,840.17	11,472.59	15,079.37
1932-33	10,130.60	9,668.81	11,888.35
1933-34	11,598.59	14,379.24	
1934-35	13,168.07	11,193.94	
1935-36	11,332.04	11,193.42	
1936-37	12,005.73	11,923.38	
1937-38	12,663.73	14,695.79	
1938-39	12,059.32		
Total	$262,148.19	$240,672.69	$200,245.57

[290]

The total cost paid by the County of Alameda for maintaining and operating said Bridges for the periods of time hereinabove set forth was $703,066.45.

Subsequent to the end of the fiscal year 1938-39 the average cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge has been approximately One Thousand Dollars ($1,000.00) per month, and the cost of re-

placing this Bridge is estimated to be approximately One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00).

The total cost of maintaining, operating or replacing said Bridges since November 17, 1913, has exceeded the income and revenues provided for the fiscal year 1913-14, or any fiscal year prior thereto, and the expenditure was not assented to by two-thirds of the qualified electors of the County of Alameda voting at an election held for that purpose.

In the fiscal year 1913-14, and in each fiscal year thereafter, the income and revenue provided by the County of Alameda for each such fiscal year was sufficient to pay for the maintenance and operation of said Fruitvale Avenue Bridge for each such one (1) fiscal year.

In the fiscal year 1913-14, and in each fiscal year thereafter, prior to the respective fiscal year of the commencement of the reconstruction of the High Street and Park Street Bridges, the income and revenue provided by the County of Alameda for each such fiscal year was also sufficient to pay for the maintenance and operation of said High Street and Park Street Bridges for each such one (1) fiscal year. [291]

XIV.

The Fruitvale Avenue Bridge is a combination railroad, vehicular and pedestrian swing span drawbridge, built upon a single concrete center pier, and has been operated and repaired since November 17, 1913, at the expense of the County of Alameda.

The tracks and right of way of the Central Pacific Railway Company and its lessee the Southern Pacific Company are and were at all times permanent, integral and inseparable parts of the Fruitvale Avenue Bridge as constructed, and said tracks and right of way are, and since the said construction were used by the Central Pacific Railway Company and its lessee the Southern Pacific Company for the transit of both freight and interurban passenger trains over said Fruitvale Avenue Bridge. Both the Central Pacific Railway Company and the Southern Pacific Company are and were at all times private corporations. The Central Pacific Railroad Company was at all times a private corporation.

XV.

The City of Oakland is on the mainland side of San Francisco Bay. Said city is, and prior to 1909, was, the terminal of all transcontinental railroads in central and northern California. Subsequent to the construction of the Park Street, High Street and Fruitvale Avenue Bridges, the population of the cities of Oakland and Alameda increased steadily and substantially as hereinafter set forth. Industry, shipping and commerce, both interstate and with foreign countries, as well as intrastate, increased proportionately in said cities. Traffic connected with said intrastate, [292] interstate and foreign commerce likewise increased upon the waters described, including the waters of the Tidal Canal. Traffic upon the three bridges spanning said Tidal Canal also increased.

The Fruitvale Avenue Bridge connects residential and industrial sections of the City of Alameda with similar sections of the City of Oakland via Fruitvale Avenue, which Avenue is also a principal thoroughfare cutting through all the main traffic arteries between the Tidal Canal and the countryside. The Fruitvale Avenue Bridge carries the only rail connection both freight and interurban passenger traffic between the mainland and the City of Alameda, which is entirely surrounded by water.

The population of the County of Alameda according to the official census of the United States from 1890 to 1930, both years inclusive, is as follows:

Year	Population
1890	93,864
1900	130,197
1910	246,131
1920	344,177
1930	474,883

The respective populations of the City of Alameda and the City of Oakland, which two cities are separated by the Tidal Canal, according to the official census of the United States from 1880 to 1930, both years inclusive, is as follows: [293]

City of Alameda

Year	Population
1880	5,708
1890	11,165
1900	16,464
1910	23,383
1920	28,806
1930	35,033

City of Oakland

Year	Population
1880	34,555
1890	48,682
1900	66,960
1910	150,174
1920	216,261
1930	284,063

XVI.

On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of County of Alameda v. Ross, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460.

XVII.

Thereafter, on July 27, 1939, the Central Pacific Railway Company and the Southern Pacific Company served notice upon the plaintiff herein requesting that the plaintiff comply with the Decree in the case of [294] United States v. Crooks, and others, and cause the Fruitvale Avenue Bridge to be inspected, maintained and renewed.

XVIII.

The decision of County of Alameda v. Ross, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460, held the license agreement to be void. The "Petition for Writ of Mandate" before the Court in that case was filed originally in the Supreme Court of the State of California on November 25, 1938. On November 28,

1938, said Supreme Court of the State of California transferred the case to the District Court of Appeal of the Third Appellate District of the State of California for hearing and determination. The decision was duly entered on April 12, 1939. On May 19, 1939, a Petition to the Supreme Court of the State of California for hearing after said decision was filed in said Supreme Court. Said application to have the cause heard in the Supreme Court after said judgment was denied by the Supreme Court on June 1, 1939. The Court, in the said case of County of Alameda v. Ross, supra, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts the Court finds:

I.

That the County of Alameda and the United States entered into a valid, binding contract, as evidenced by the Resolution adopted by the Board of Supervisors of said [295] County on December 6, 1909; by the License issued by the Secretary of War on September 3, 1910; and the Resolution adopted by the Board of Supervisors of said County on November 10, 1913.

II.

That under said contract the said County of Alameda is obligated to maintain, operate, repair, or rebuild said Fruitvale Avenue bridge.

III.

That the defendants Central Pacific Railway Company, and Southern Pacific Company were and are not parties to said contract between the said County of Alameda and the United States.

IV.

That the counter claim of the defendant County of Alameda be dismissed and said defendant County take nothing thereby.

.....

United States District Judge

[Endorsed]: Lodged July 16, 1940. [296]

[Title of District Court and Cause.]

DEFENDANT COUNTY OF ALAMEDA'S PROPOSED AMENDMENTS AND ADDITIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Now comes the Defendant County of Alameda and proposes the following amendments and additions to Plaintiff's "Findings of Fact and Conclusions of Law":

1. Page 1, line 6, after the word "Coakley", insert Chief.

2. Page 1, line 8, before the word "appearing" insert Cecil Mosbacher, Deputy District Attorney.

FINDINGS OF FACTS

1. Paragraph II, to the last line of this Paragraph at page 3 after the words . . . "for the purpose of removing the sedi- [297] ment from the same" add the following: and affording a deeper entrance to said San Leandro Bay through San Antonio Estuary and the Canal, all in the interest of commerce and navigation on the east side of San Francisco Bay.

2. Paragraph V, line 2, after the words "said Tidal Canal" insert: to a depth averaging in soundings from 8 to 10 feet, said soundings referring to the plane of mean lower low water, as per "Exhibit 2" page 91 of the "Agreed Statement of Facts" on file herein.

3. Paragraph V, line 5, after the words "at Fruitvale Avenue" insert: the latter with a clearance below such bridge of 12 feet 8 inches above mean lower low water as per "Exhibit 2" page 91 of the "Agreed Statement of Facts" on file herein.

4. Paragraph V, delete the last sentence of this Paragraph, at page 6, "The Tidal Canal was not open to navigation" and substitute: The Tidal Canal was navigable in fact.

5. Paragraph VII, at page 7, line 1, after the words "at Washington Avenue" insert: Said Agreement read as follows:

"A.

"This Agreement, made and entered into this Seventh (7th) day of March A. D. 1901, between the United States of America the Cen-

tral Pacific Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and the Southern Pacific Company, a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky.

"Witnesseth: That whereas, the United States of America, as plaintiff, did on the fourth day of March 1876, commence proceedings in the Third District Court of the State of California, in the County of Alameda, against the Central Pacific Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, and other defendants, for the condemnation of certain lands and rights owned and claimed [298] by said defendants and required by said plaintiff for the construction of a Tidal Canal, authorized by certain Acts of Congress making appropriations for the improvement of Oakland Harbor.

"And Whereas, on the fourth day of November, 1882, in the Superior Court of the County of Alameda, State of California, jurisdiction having been conferred thereon, a certain decree was filed in said cause condemning the lands and rights of said defendants, and especially condemning the lands and rights of the said Central Pacific Railroad Company for the uses and purposes for which the same were sought, and which is more especially set out in the complaint therein and in said decree.

"And Whereas, in said decree it was determined and adjudged as a condition to be kept and performed by the United States of America, that in the construction of said canal, the said United States should, at its own expense, construct and keep in repair for the said Central Pacific Railroad Company, certain railroad bridges across the same, along the line of the present railroad crossing the said proposed canal that is to say, one along the line of said railroad on or adjoining Fruitvale Avenue, and one along the line of said railroad on or adjoining Washington Avenue, which said last mentioned line is shown colored red on the annexed map and made part hereof.

"And Whereas, the said Central Pacific Railway Company is the successor in interest of the said Central Pacific Railroad Company, and as such has succeeded to all the rights and privileges in and by virtue of said decree of Court,

"And Whereas, The Southern Pacific Company, as the lessee, has or claims some interest in the decree aforesaid.

"And Whereas, the abandonment of one of said bridges, to wit, the one on the line of said railroad on or adjoining Washington Avenue would be in the interest of commerce and navigation, and would relieve the said United States of great expense in constructing and keeping the same in repair.

"Now Therefore, in consideration of the

premises, and the sum of Fifty thousand ($50,000) dollars paid by the United States to the Central Pacific Railway Company, the receipt whereof is hereby acknowledged, the Central Pacific Railway Company and the Southern Pacific Company do hereby release, absolve and discharge, now and forever, both in law and in equity the said United States from the performance of the obligation and condition to construct the bridge along the said line of railroad on or near Washington Avenue, and the United States is hereby released, absolved and discharged, now and forever, both in law and in equity, from the performance of the obligation and condition to construct the said proposed [299] bridge along the said line of railroad on or near Washington Avenue, and accepts this agreement and payment as a full performance of said decree in reference to said last named bridge.

"In Witness Whereof, the parties hereto, the United States by W. H. Heuer, Lieutenant Colonel, Corps of Engineers, U. S. A., duly authorized by law and the Secretary of War, the Central Pacific Railway Company by its President and Secretary, duly authorized by resolution of its Board of Directors passed on the Thirty First day of January 1901, and the Southern Pacific Company by its President and Secretary, duly authorized by resolution of its Board of Directors passed on the 7th day of

March 1901, have hereunto set their hands and seals the day and year first above written.

"Signed, sealed and delivered in presence of G. KNIGHT WHITY.

[Signet]

[Seal] W. H. HEUER,
Lieutenant Colonel, Corps of Engineers, U.S. A.
CENTRAL PACIFIC RAILWAY COMPANY
By ISAAC L. REQUA,
President
J. L. WILLCUTT,
Secretary.
SOUTHERN PACIFIC COMPANY
By CHARLES M. HAYS,
President
I. E. GATES,
Secretary."

(Copies of resolutions and acknowledgements attached.)"

6. Paragraph VII, delete the last sentence of this Paragraph, at page 7, "The defendant railroad companies claim no right or title in the Fruitvale Avenue bridge except those rights conferred upon them, or their predecessors, by the decree in United [300] States v. Crooks et al." and substitute the following: The defendant railroad companies claim a right to have the Fruitvale Avenue Bridge oper-

ated, maintained, repaired and whenever necessary, replaced by the plaintiff under the decree in United States v. Crooks, et al.

7. Paragraph VIII, at page 8, add thereafter the following new paragraph:

"VIII-A

"In the Rivers and Harbors Act, approved June 25, 1910, 36 Stat. 630, c. 382, it is provided, inter alia, as follows:

> 'Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer.' "

7-a. Paragraph X condition 3, lines 3 and 4 delete the following words: "furnishing and installing new electrical power".

8. Strike all of Paragraph XI and substitute the following:

"XI.

"Between September 3, 1910, and November 10, 1913, the plaintiff installed electrical operating ma-

chinery on the said bridges and thereafter the bridges were operated, maintained and repaired by the County of Alameda instead of the plaintiff.

"In 1910 a harbor line survey was made for San Francisco Bay for the purpose of establishing harbor lines in said area pursuant to recommendation of the Board of Engineers of the United States Army and authorization of Congress previously made. [301]

"In the making of said survey a survey made prior to 1876 for the purpose of the condemnation action of United States v. Crooks, et al was used in the preparation of the map of harbor lines of the Tidal Canal and San Leandro Point Area as shown on Map, or Sheet, No. 5 (Plaintiff's Exhibit 12).

"The endorsement on the "Maps of San Francisco Bay, Cal., showing Harbor Lines Prepared by the San Francisco Harbor Line Board 1912", including Plaintiff's Exhibit 12, read as follows:

'War Department
"Washington, Jany. 20 1913.

"The harbor lines shown and described on the accompanying maps, viz: San Francisco Nos. 1, 2 & 3, and San Francisco Bay Nos. 1 to 7 inclus. are approved to supersede all harbor lines, previously approved for the localities shown thereon.

ROBERT SHAW OLIVER
Asst. Secretary of War.'

"The harbor lines thus approved were revocable at will by the Secretary of War and were in fact revoked in 1929 by the Secretary of War, at which time they were changed by moving the pierhead lines back to the bulkhead lines so that thereafter said lines were coterminous with the property lines of the property adjoining the Tidal Canal.

"The area between pierhead and bulkhead lines as shown on Plaintiff's Exhibit 10 was made available for use by adjoining property owners at the pleasure of the plaintiff and without special lease of any kind as shown by the endorsement on the title sheet of Plaintiff's Exhibit 9 reading as follows:

'War Department.

'Washington, June 3, 1913

'The owners of property abutting the lands included in the right of way acquired by the United States for the Oakland Tidal Canal shown on accompanying Sheet No. 5 are hereby authorized and permitted to occupy, with open-work non-permanent structures for wharf purposes, the portions of the strip of U. S. property fronting their respective properties and situated between the pierhead and bulkhead lines [302] approved Jan. 20, 1913, without special lease or charges of any kind, it being expressly understood that this permission is revocable at any time when this area may be again required for purposes of navigation and

shall not be construed as a relinquishment of the Government title to the said right of way.

HENRY BRECKINRIDGE
Asst. Secretary of War.' "

9. Paragraph XVI, add to the end thereof the following:—Said County subsequently agreed to operate said Bridge until March 31, 1940, but in so doing it was agreed that said County waived no rights, expressly retained all rights it might have in the premises, and that the position of the County of Alameda in this suit was not to be prejudiced in any way by such operation. It was further agreed that should said County subsequently agree to operate said Bridge after March 31, 1940, or should said County in any manner continue to operate said Bridge, that said County would thereby waive no rights, but would expressly retain all rights it might have in the premises, and that the position of the County of Alameda in this suit would not be prejudiced in any way by such operation or by such extension or extensions of time—.

10. Paragraph XVIII, to the last line after the words . . . "December 6, 1909" add the following:—but said resolution was incorporated in the resolution of the Board of Supervisors of the County of Alameda of November 10, 1913, which latter resolution was before said Court. The United States was notified by the District Attorney of the County of Alameda, as counsel for the County of Alameda, of the filing of said "Petition for Writ of Mandate" in said action. Copies of all papers filed in said action by both petitioner and respondent, including the

stipulation of facts and all briefs, were sent to and received by the United States Attorney [303] in San Francisco during the proceedings and before the case was submitted—.

CONCLUSIONS OF LAW

1. Paragraph II, line 2, after the word "or" insert:—when necessary—.

2. Paragraph III, line 2, delete "not parties" and substitute:—third party beneficiaries—.

3. Strike all of Paragraph IV and substitute the following:

"IV

"That prior to 1909 the Tidal Canal was a navigable waterway."

Respectfully submitted,

RALPH E. HOYT
District Attorney in and for the County of Alameda, State of California.

J. F. COAKLEY
Chief Assistant District Attorney in and for the County of Alameda, State of California.

ROBERT H. McCREARY
Assistant District Attorney in and for the County of Alameda, State of California.

CECIL MOSBACHER
Deputy District Attorney in and for the County of Alameda, State of California.

Attorneys for Defendant, County of Alameda.

[Endorsed]: Lodged July 22, 1940. [304]

No. 9748

United States

2

Circuit Court of Appeals

For the Ninth Circuit.

COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Political Subdivision of the State of California),

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

VOLUME II

Pages 241 to 512

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

FILED

APR - 9 1941

PAUL P. O'BRIEN,
CLERK

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

[Title of District Court and Cause.]

SUPPLEMENTAL CONCLUSIONS OF LAW

As supplemental and additional conclusions of law from the facts heretofore found by the Court, the Court finds:

I.

The County of Alameda is now estopped to set aside its contract with the United States to maintain, operate, repair or rebuild the Fruitvale Avenue Bridge.

II.

The County of Alameda had and has authority to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge.

III.

Congress had and has power to authorize the County to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge. [305]

IV.

The expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge were and are not gifts to a private corporation of public money prohibited by §31 of Article IV of the California Constitution.

V.

The contract between the County of Alameda and the United States does not violate §18 of Article XI of the Constitution of California forbidding a County to incur any indebtedness or liability ex-

ceeding in any year the income and revenue provided for such year.

VI.

The contract between the United States and the County of Alameda is not void for lack of mutuality.

VII.

The contract between the United States and the County of Alameda is not void for uncertainty.

VIII.

The Courts of the State of California had no jurisdiction to determine substantial rights of the United States in County of Alameda vs. Ross, 32 Cal. App. (2d) 135; 89 Pac. (2d) 460.

.....

United States District Judge.

....., 1940.

[Endorsed]: Lodged August 2, 1940. [306]

[Title of District Court and Cause.]

DEFENDANT COUNTY OF ALAMEDA'S OBJECTIONS TO PLAINTIFF'S SUPPLEMENTAL CONCLUSIONS OF LAW

Now come the defendant, County of Alameda, and objects to each and every, all and singular of the allegations contained in plaintiff's proposed

Conclusions of Law and Supplemental and Additional Conclusions of Law on file herein.

RALPH E. HOYT
District Attorney in and for the County of Alameda, State of California
J. F. COAKLEY
Chief Assistant District Attorney in and for the County of Alameda, State of California
ROBERT H. McCREARY
Assistant District Attorney in and for the County of Alameda, State of California
CECIL MOSBACHER
Deputy District Attorney in and for the County of Alameda, State of California
Attorneys for Defendant
County of Alameda

[Endorsed]: Filed Sept. 21, 1940. [307]

District Court of the United States, Northern District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Saturday, the 14th day of September, in the year of our Lord one thousand nine hundred and forty

Present: the Honorable Harold Louderback District Judge

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, ET AL.

On motion of W. E. Licking, Esq., Assistant United States Attorney, attorney for plaintiff, Ordered that this case be placed on the calendar for September 21st, 1940, at 9:30 a. m., for settlement of findings of fact and conclusions of law. [308]

[Title of District Court and Cause.]

NOTICE

To: Ralph E. Hoyt, Esq.,
District Attorney, Alameda County,
Court House Building,
Oakland, California.
Frank J. Hennessy, Esq.,
United States Attorney,
Post Office Building,
San Francisco, California.
E. J. Foulds, Esq.,
65 Market Street,
San Francisco, California.

You are hereby notified that on September 14th, 1940, Judge Harold Louderback Ordered that the

above entitled case be placed on the calendar for September 21st, 1940, at 9:30 A. M. for the settlement of findings of fact and conclusions of law.

WALTER B. MALING,
Clerk.

(a)

San Francisco, California
September 16th, 1940. [309]

District Court of the United States, Northern District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Saturday, the 21st day of September, in the year of our Lord one thousand nine hundred and forty.

Present: the Honorable Harold Louderback, District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, ET AL.

This case came on regularly this day for hearing on the settlement of findings. After hearing attorneys, it is Ordered that said findings be submitted.

[310]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause heretofore came on duly and regularly for trial and hearing before this Court, sitting without a jury; Messrs. Frank J. Hennessy, United States Attorney, William E. Licking, Assistant United States Attorney, and Brice Toole, Attorney, Department of Justice, appearing for the plaintiff, and Messrs. Ralph E. Hoyt, District Attorney, J. F. Coakley, Chief Assistant District Attorney, Robert H. McCreary, Assistant District Attorney, and Cecil Mosbacher, Deputy District Attorney, appearing for the defendant County of Alameda, and Mr. E. J. Foulds, appearing for the defendants Central Pacific Railway Com- [311] pany, and Southern Pacific Company; both oral and documentary evidence having been introduced at the trial thereof, on behalf of the respective parties hereto, and the evidence being closed, and the cause submitted to this Court for its decision and determination, and the Court being duly advised in the premises, finds the following facts:

FINDINGS OF FACTS

I.

The plaintiff is the United States. The County of Alameda was at all times herein mentioned, and now is a body corporate and politic, and a political

subdivision of the State of California. The Central Pacific Railway Company, and the Southern Pacific Company are private corporations, duly authorized and licensed to do business within the State of California, and are engaged in the business of operating railroad lines within and without said State and are the owners of, or claim some interest in, certain railway rights of way within the said County of Alameda in or over the Tidal Canal described hereafter, and more particularly in, over and upon the Fruitvale Avenue Bridge hereinafter mentioned.

II.

The City of Alameda and the City of Oakland are both situated upon the east shore of San Francisco Bay, a navigable body of water. Both said cities are located within Alameda County, State of California, and are separated from each other by a navigable body of water known at various times and in various quarters by the following names: San [312] Antonio Estuary, Oakland Estuary, Oakland Harbor, Inner Harbor and Tidal Canal and Alameda Estuary. Said body of water is roughly seven miles in length, extending in a general east and west direction from San Leandro Bay, an arm of San Francisco Bay, on the east, to another point in San Francisco Bay proper at the end of the moles of the Southern Pacific Railroad Company and the Western Pacific Railroad Company on the west. Said Estuary constitutes what is commonly known as Oakland's inner harbor; the outer harbor

extending in a northeasterly direction for about two miles from the entrance to the inner harbor. The westerly end of the Estuary, for a distance of about two miles, is an entrance channel, protected by stone retaining walls on either side. Said entrance channel varies from Seven Hundred and Fifty to Eight Hundred and Fifty feet in width. Immediately east of said entrance channel lies the main portion of the inner harbor, with docking facilities; the width of the channel here being Six Hundred feet, and the natural harbor varying from Six Hundred and Fifty feet at the narrowest points to about Three Thousand Five Hundred Feet at the easterly end where the harbor widens to form what is known as Brooklyn Basin.

Easterly of Brooklyn Basin and forming a continuous part of the same body of water is the "Tidal Canal" nearly two miles in length connecting the inner harbor with San Leandro Bay. Said Tidal Canal was originally dredged by the United States to turn the water from San Leandro Bay or estuary through a tidal canal into the head of San Antonio estuary, so as to increase the tidal flow into and through said San Antonio estuary, for the purpose of removing the sediment from the same, AND AFFORDING A DEEPER ENTRANCE TO [313] SAID SAN LEANDRO BAY THROUGH SAN ANTONIO ESTUARY AND THE CANAL, ALL IN THE INTEREST OF COMMERCE AND NAVIGATION ON THE EAST SIDE OF SAN FRANCISCO BAY.

III.

In the year 1874 Congress enacted the Rivers and Harbors Act for that year, in which the sum of $100,000 was appropriated "for the improvement of Oakland harbor;" (18 Stat. 237, c. 457) to be expended under the direction of the Secretary of War.

In 1876 the United States instituted a condemnation proceeding in the District Court of the Third Judicial District in and for the State of California (now the Superior Court of the State of California, in and for the County of Alameda) to acquire a right of way for the said Tidal Canal, said action being entitled The United States, plaintiff, v. Crooks, County of Alameda, Central Pacific Railroad Company, et al, defendants, action No. 3590 in the records of the County Clerk of the County of Alameda for the District Court of the Third Judicial District, the State of California, in and for the County of Alameda.

IV.

In said suit the County of Alameda and the Central Pacific Railroad Company were named, among others, as defendants and the United States sought to condemn the rights of the County and of the railroad in certain highways and railroad rights of way which crossed the proposed Tidal Canal at the places where the Fruitvale Avenue, High and Park Street bridges are now located, and at Washington Avenue, where a railroad right of way was then

located. [314] The right of way and tracks of the Central Pacific Railroad Company, which crossed the proposed Tidal Canal at Fruitvale Avenue, paralleled and adjoined the right of way of the county road belonging to the defendant, County of Alameda, which also crossed the proposed Tidal Canal at Fruitvale Avenue.

The County of Alameda and the railroad company asked for no damages in said condemnation proceedings, and in the decree in said action hereinabove referred to, it was provided, among other things

> "Defendants, the County of Alameda, The Central Pacific Railroad Company, Charles Heinecke and S. A. Smith, not having claimed damages, no damages are awarded to them.
>
> "It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the lines of said canal."

V.

After said decree of condemnation, the United States constructed said Tidal Canal TO A DEPTH AVERAGING IN SOUNDINGS FROM 8 TO 10 FEET, SAID SOUNDINGS REFERRING TO

THE PLANE OF MEAN LOWER LOW WATER, —as per "Exhibit 2" page 91 of the "Agreed Statement of Facts" on file herein, and constructed, and until November 17, 1913, maintained and operated highway drawbridges at Park Street and High Street, and a combination railroad, vehicular and pedestrian drawbridge at Fruitvale Avenue, THE LATTER WITH A CLEARANCE BELOW SUCH BRIDGE OF 12 FEET 8 INCHES ABOVE MEAN LOWER LOW WATER—as per "Exhibit 2" page 91 of the "Agreed Statement of Facts on file herein. The Park Street Bridge was completed [315]
in 1891; the High Street and Fruitvale Avenue Bridges were completed in 1901 and said construction of said Tidal Canal was completed in 1903.

The bridges were constructed as drawbridges of the swing type, turning or pivoting horizontally upon central piers, and were equipped with hand-operated machinery. It took approximately thirty minutes to open and thirty minutes to close each of these bridges. After these bridges were equipped with electrical operating machinery, as hereinafter set forth, it took from two to three minutes to open, and the same time to close each of said bridges.

Prior to said installation of electrical operating machinery the United States did not regularly operate said bridges, but did, on occasions, open and close them on request of private interests for the passage of vessels; private interests on occasions also opened and closed said bridges on their own

responsibility for the passage of vessels which could not clear said bridges when closed; and boats, barges and scows which could clear said bridges when closed plied up and down said Tidal Canal. The Tidal Canal was not open to navigation.

VI.

Prior to the institution of said condemnation proceedings the Central Pacific Railroad Company (predecessor of defendant Central Pacific Railway Company) was the owner of two lines of railroad extending across the lands sought to be condemned. One line of said railroad was on or adjoining Fruitvale Avenue, and the other line was on or adjoining Washington Avenue, across the site of the proposed Tidal Canal, in said Alameda County, and the said Central [316] Pacific Railroad Company was the owner of rights of way in said two lines of railroad, and was a party defendant in said condemnation proceedings.

VII.

On March 7, 1901, an agreement in writing was entered into between the United States, Central Pacific Railway Company (said Central Pacific Railway Company having succeeded to the interest of said Central Pacific Railroad Company) and the Southern Pacific Company (leasee of Central Pacific Railway Company), under which agreement the Central Pacific Railway Company in consideration of $50,000 agreed to abandon its line of railroad on or adjoining Washington Avenue, and to

relieve the United States of any obligation to construct or maintain a drawbridge across said Tidal Canal at Washington Avenue. The defendant railroad companies claim no right or title in the Fruitvale Avenue bridge except those rights conferred upon them, or their predecessors, by the decree in United States v. Crooks et al.

VIII.

On December 6, 1909, the Board of Supervisors of Alameda County adopted a Resolution as follows:

"RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA, ACCEPTING PARK STREET, FRUITVALE AVENUE AND HIGH STREET BRIDGES.

"Whereas, there exists in the County of Alameda, State of California, over and across the United States Tidal Canal, certain draw bridges commonly known as the Park Street Bridge and Fruitvale Avenue Bridge, and the High Street Bridge, all of which bridges were constructed over said canal by, and belong to, and are the property of, the United States of America; and [317]

"Whereas, no provision has ever been made for the operation of said bridges by the United States Government; and

"Whereas, that portion of said canal between said bridges has never been open to navigation; and

"Whereas, the requirements of commerce and shipping would be materially benefited by the operation of said bridges, and the opening of said canal to navigation in such manner as to permit the passage of vessels in said canal; and

"Whereas, Lieutenant Colonel John Biddle, U. S. A., in his report upon the improvement of rivers and harbors in the First San Francisco, California Districts, has recommended that the bridges hereinbefore referred to, to-wit, the High Street Bridge, Fruitvale Avenue Bridge and the Park Street Bridge be turned over to the County of Alameda, provided that the County of Alameda thereafter assume all cost of repair, operation and replacement when necessary; and

"Whereas, the Honorable Joseph R. Knowland, Congressman from the Third District of California, has succeeded in securing the recommendation of the War Department that permission be given to turn these bridges over to the County of Alameda; and,

"Whereas, the City of Alameda, acting by and through its regularly constituted authorities thereunto duly authorized, has agreed to supply electric power for the operation of said bridges hereinabove referred to for the period of five years, without cost to the said County of Alameda, now, therefore,

"Be It Resolved that the County of Alameda, by and through its Board of Supervisors there-

unto duly authorized, hereby agrees to accept said bridges, to-wit: The said Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge and to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges, and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the waterfront of the tidal canal and establish harbor lines so as to permit the construction of wharves and docks; and

"Be It Further Resolved that a copy of this resolution be sent by this Board under seal of this Board to United States Senator George C. Perkins, Congressman Joseph R. Knowland, Lieutenant [318] Colonel John Biddle, and to the City Clerk of the City of Alameda.

"Passed and adopted by the following votes:

"Ayes: Supervisors Bridge, Foss, Mullins and Ch. Honrner 4.

"Noes: Supervisors None.

"Absent: Supervisors Kelley.

I hereby certify that the foregoing is a true and correct copy of a Resolution adopted by the

Board of Supervisors of Alameda, Cal., Monday, December 6th, 1909.

JOHN P. COOK,
County Clerk and Ex-officio Clerk of the Board of Supervisors of Alameda County, Cal.
By H. M. WILSON,
Deputy Clerk."

IX.

On September 3, 1910, the Secretary of War issued a license to the County of Alameda as follows:

"J. A. G. O.
(27215)

"Whereas, by the Act of Congress approved June 25, 1910 entitled 'An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes' (Public ..... No. 264), and under the clause of appropriation therein for 'Improving harbor at Oakland, California', it is provided, inter alia, as follows:

'Provided further, that the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and

just to the United States and to said local authorities; provided further, that of the appropriation herein made so much as shall [319] be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer';

"Now, Therefore, under the authority and discretion in him vested by the above-quoted provision of said Act of Congress, and in accordance with the recommendation of the Chief of Engineers, United States Army, the Secretary of War hereby grants unto the Board of Supervisors of Alameda County, California, a License, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

This License is granted subject to the following conditions and provisions:

1.—That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any one of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2.—That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3.—That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4.—That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5.—That said Board of Supervisors shall maintain the necessary number of bridge-tenders [320] at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic.

"Witness my hand this 3rd day of September, 1910.

(Signed) JOHN C. SCOFIELD
Assistant and Chief Clerk
For the Secretary of War,
in his absence".

X.

On November 10, 1913, the Board of Supervisors of Alameda County adopted a Resolution as follows:

"RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA.

Introduced by Supervisor.....

At meeting held Nov. 10, 1913.

"Whereas, This Board of Supervisors, by resolution heretofore adopted, agreed to accept certain draw bridges across the United States Tidal Canal in Alameda County, commonly known as the Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge, and assume all costs of future repair, operation and replacement of said bridges, provided that each of said bridges were placed in such condition and repair by the United States Government that said bridges, and each of them, might be operated by electricity, and that the United States should, under such terms and conditions as it might see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks; and

Whereas, subsequent to the adoption of said resolution, and on the 3rd day of September, 1910, the Secretary of War, in accordance with the provisions of an Act of Congress, approved

June 25, 1910, entitled 'An Act making appropriations for the construction, repair and preserva- [321] tion of certain public works on rivers and harbors, and for other purposes' (public No. 264), issued a license to the Board of Supervisors, revocable at will by the Secretary of War, to assume control of the said three bridges built by the United States in connection with the improvement of Oakland Harbor, California, which said license was granted subject to the following conditions and provisions, to-wit:

1. That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2. That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3. That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing

and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5. That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic; and [322]

"Whereas, the United States has put all three bridges in condition for operation of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished bridge-tenders' houses and highway gates; and, also, overhauled all old machinery and put it in good order for operation, under the new conditions as required by paragraph 3 of said License, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

Be It Resolved that the Board of Supervisors of Alameda County, California, does

hereby accept and assume control of the said three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor, to-wit, the Park Street Bridge, the Fruitvale Avenue Bridge and the High Street Bridge, subject to the conditions and provisions of the aforesaid License of September 3, 1910, said acceptance being effective from and after Monday, November 17th, 1913.

Adopted by the following vote:

Ayes: Supervisors Bridge, Foll, Kelley, Murphy and Chairman Mullins—5.

Noes: Supervisors None.

Absent: Supervisors None.

I, John P. Cook, County Clerk, and ex-officio Clerk of the Board of Supervisors of Alameda County, State of California, do hereby certify that the foregoing resolution hereunto attached is a true and correct copy of a resolution adopted by said Board of Supervisors of Alameda County, State of California, on Monday, November 10, A. D. 1913.

JOHN P. COOK,
County Clerk and ex-Officio Clerk of the Board of Supervisors of Alameda County, State of California.
By H. M. WILSON,
Deputy Clerk."

XI.

On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made available to adjacent property owners, a twenty-five foot [323] strip of property along each side of the Canal for the construction of wharves and warehouses.

XII.

Thereafter the said bridges were operated, repaired and maintained at the expense of said County and have been so repaired, maintained and operated except that the bridges at Park Street and High Street have been reconstructed and are now operated, repaired and maintained under other arrangements between the United States and said County which are of no significance to the present case.

XIII.

The total cost to the United States for the repair and electrification of said Fruitvale Avenue, High Street and Park Street Bridges was $21,358.80.

The annual cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge commencing during the fiscal year 1913-1914 to and including the fiscal year 1938-39 is hereinafter set forth. The annual costs paid by the County of Alameda for maintaining and operating the High Street and Park Street Bridges commencing during the fiscal year 1913-14 to the respective fiscal year of commencement of reconstruction of the High Street and Park Street Bridges are also set forth as follows: [324]

Fiscal Year	Fruitvale Avenue Bridge	High Street Bridge	Park Street Bridge
1913-14	$ 1,937.84	$ 1,875.47	$ 2,891.21
1914-15	11,842.51	14,146.76	9,684.14
1915-16	3,078.39	2,344.54	4,078.73
1916-17	4,072.45	3,953.74	2,840.85
1917-18	5,075.85	2,826.06	6,224.64
1918-19	6,949.80	6,652.10	10,153.72
1919-20	7,812.75	9,769.53	10,357.54
1920-21	18,465.73	6,103.83	9,167.29
1921-22	6,671.50	6,884.75	13,644.52
1922-23	7,215.71	6,796.90	13,503.47
1923-24	6,331.12	14,406.92	8,048.20
1924-25	7,558.69	9,940.27	7,466.12
1925-26	10,037.87	6,832.69	9,972.74
1926-27	8,322.69	7,485.69	7,856.16
1927-28	7,751.94	9,690.75	13,502.22
1928-29	9,888.50	10,965.56	21,003.10
1929-30	12,797.87	22,319.42	10,116.56
1930-31	29,738.53	13,150.53	12,766.64
1931-32	13,840.17	11,472.59	15,079.37
1932-33	10,130.60	9,668.81	11,888.35
1933-34	11,398.59	14,379.24	
1934-35	15,168.07	11,193.94	
1935-36	11,332.04	11,193.42	
1936-37	12,005.73	11,923.38	
1937-38	12,663.73	14,695.79	
1938-39	12,059.32		
Total	$262,148.19	$240,672.69	$200,245.57

The total cost paid by the County of Alameda for maintaining and operating said Bridges for the periods of time hereinabove set forth was $703,066.45.

Subsequent to the end of the fiscal year 1938-39 the average cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge has been approx- [325] imately One Thousand Dollars ($1,000.00) per month, and the

cost of replacing this Bridge is estimated to be approximately One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00).

The total cost of maintaining, operating or replacing said Bridges since November 17, 1913, has exceeded the income and revenues provided for the fiscal year 1913-14, or any fiscal year prior thereto, and the expenditure was not assented to by two-thirds of the qualified electors of the County of Alameda voting at an election held for that purpose.

In the fiscal year 1913-14, and in each fiscal year thereafter, the income and revenue provided by the County of Alameda for each such fiscal year was sufficient to pay for the maintenance and operation of said Fruitvale Avenue Bridge for each such one (1) fiscal year.

In the fiscal year 1913-14, and in each fiscal year thereafter, prior to the respective fiscal year of the commencement of the reconstruction of the High Street and Park Street Bridges, the income and revenue provided by the County of Alameda for each such fiscal year was also sufficient to pay for the maintenance and operation of said High Street and Park Street Bridges for each such one (1) fiscal year.

XIV.

The Fruitvale Avenue Bridge is a combination railroad, vehicular and pedestrian swing span drawbridge, built upon a single concrete center pier, and has been operated and repaired since November 17, 1913, at the expense of the County of Alameda.

[326]

The tracks and right of way of the Central Pacific Railway Company and its lessee the Southern Pacific Company are and were at all times permanent, integral and inseparable parts of the Fruitvale Avenue Bridge as constructed, and said tracks and right of way are, and since the said construction were used by the Central Pacific Railway Company and its lessee the Southern Pacific Company for the transit of both freight and interurban passenger trains over said Fruitvale Avenue Bridge. Both the Central Pacific Railway Company and the Southern Pacific Company are and were at all times private corporations. The Central Pacific Railroad Company was at all times a private corporation.

XV.

The City of Oakland is on the mainland side of San Francisco Bay. Said City is, and prior to 1909, was, the terminal of all trancontinental railroads in central and northern California. Subsequent to the construction of the Park Street, High Street and Fruitvale Avenue Bridges, the population of the cities of Oakland and Alameda increased steadily and substantially as hereinafter set forth. Industry, shipping and commerce, both interstate and with foreign countries, as well as intrastate, increased proportionately in said cities. Traffic connected with said intrastate, interstate and foreign commerce likewise increased upon the waters described, including the waters of the Tidal Canal. Traffic upon the three bridges spanning said Tidal Canal also increased.

The Fruitvale Avenue Bridge connects residential and industrial sections of the City of Alameda with similar [327] sections of the City of Oakland via Fruitvale Avenue, which Avenue is also a principal thoroughfare cutting through all the main traffic arteries between the Tidal Canal and the countryside. The Fruitvale Avenue Bridge carries the only rail connection both freight and interurban passenger traffic between the mainland and the City of Alameda, which is entirely surrounded by water.

The population of the County of Alameda according to the official census of the United States from 1890 to 1930, both years inclusive, is as follows:

Year	Population
1890	93,864
1900	130,197
1910	246,131
1920	344,177
1930	474,883

The respective populations of the City of Alameda and the City of Oakland, which two cities are separated by the Tidal Canal, according to the official census of the United States from 1880 to 1930, both years inclusive, is as follows:

City of Alameda

Year	Population
1880	5,708
1890	11,165
1900	16,464
1910	23,383
1920	28,806
1930	35,033 [328]

City of Oakland

Year	Population
1880	34,555
1890	48,682
1900	66,960
1910	150,174
1920	216,261
1930	284,063

XVI.

On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of County of Alameda v. Ross, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460.

XVII.

Thereafter, on July 27, 1939, the Central Pacific Railway Company and the Southern Pacific Company served notice upon the plaintiff herein requesting that the plaintiff comply with the Decree in the case of United States v. Crooks, and others,

and cause the Fruitvale Avenue Bridge to be inspected, maintained and renewed.

XVIII.

The decision of County of Alameda v. Ross, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460, held the license agreement to be void. The "Petition for Writ of Mandate" before the Court in that case was filed originally in the [329] Supreme Court of the State of California on November 25, 1938. On November 28, 1938, said Supreme Court of the State of California transferred the case to the District Court of Appeal of the Third Appellate District of the State of California for hearing and determination. The decision was duly entered on April 12, 1939. On May 19, 1939, a Petition to the Supreme Court of the State of California for hearing after said decision was filed in said Supreme Court. Said application to have the cause heard in the Supreme Court after said judgment was denied by the Supreme Court on June 1, 1939. The Court, in the said case of County of Alameda v. Ross, supra, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts the Court finds:—

I.

That the County of Alameda and the United States entered into a valid, binding contract, as

evidenced by the Resolution adopted by the Board of Supervisors of said County on December 6, 1909; by the License issued by the Secretary of War on September 3, 1910; and the Resolution adopted by the Board of Supervisors of said County on November 10, 1913. [330]

II.

That under said contract the said County of Alameda is obligated to maintain, operate, repair, or rebuild said Fruitvale Avenue Bridge.

III.

The County of Alameda is now estopped to set aside its contract with the United States to maintain, operate, repair or rebuild the Fruitvale Avenue Bridge.

IV.

The County of Alameda had and has authority to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge.

V.

Congress had and has power to authorize the County to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge.

VI.

The expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge were and are not gifts to a private corpora-

tion of public money prohibited by Section 31 of Article IV of the California Constitution.

VII.

The Contract between the County of Alameda and the United States does not violate Section 18 of Article [331] XI of the Constitution of California forbidding a County to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year.

VIII.

The contract between the United States and the County of Alameda is not void for lack of mutuality.

IX.

The contract between the United States and the County of Alameda is not void for uncertainty.

X.

The courts of the State of California had no jurisdiction to determine substantial rights of the United States in County of Alameda vs. Ross, 32 Cal. App. (2d) 135; 89 Pac. (2d) 460.

XI.

That the defendants Central Pacific Railway Company, and the Southern Pacific Company were and are not parties to said contract between the said County of Alameda and the United States.

XII.

That the counter claim of the defendant County of Alameda be dismissed and said defendant County take nothing thereby.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Oct. 10, 1940. [332]

In the Southern Division of the United States District Court for the Northern District of California.

No. 21467-L

UNITED STATES OF AMERICA,
Plaintiff,

vs.

COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Political Subdivision of the State of California), CENTRAL PACIFIC RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY,
Defendants.

DECREE

This cause came on regularly for trial before the Court sitting without a jury on the 21st and 22nd days of March, 1940; Messrs. Frank J. Hennessy, United States Attorney, William E. Licking, Assistant United States Attorney, and Brice Toole,

Attorney, Department of Justice, appearing for the plaintiff, and Messrs. Ralph E. Hoyt, District Attorney, J. F. Coakley, Chief Assistant District Attorney, Robert H. McCreary, Assistant District Attorney, and Cecil Mosbacher, Deputy District Attorney, appearing for the defendant County of Alameda, and E. J. Foulds appearing for the defendants Central Pacific Railway Company and Southern Pacific Company, and the Court having heard the testimony and examined the proofs offered by the respective parties, [333] and the Court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It is hereby ordered, adjudged and decreed:

1. That the defendant County of Alameda maintain, repair, and operate the Fruitvale Avenue bridge at its sole cost and expense;

2. That the County of Alameda rebuild said bridge at its sole cost and expense if the same should be burned, destroyed or become inadequate for the purpose it serves;

3. That the plaintiff and the defendants Central Pacific Railway Company and the Southern Pacific Company are required to pay nothing towards the maintenance, repair, operation or rebuilding of said bridge;

4. That the Court declares:

a. That the County of Alameda and the United States entered into a valid, binding con-

tract under which the County of Alameda became obligated to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge (which bridge is more fully described in the findings of fact filed herein), and the United States is relieved of all liability in respect thereto;

b. That the County of Alameda is now estopped to deny or question the validity of the contract between said County and the United States;

c. That the defendants Central Pacific Railway Company and Southern Pacific Company [334] were and are not parties to the contract between the County of Alameda and the United States.

5. That the counterclaim of the defendant County of Alameda be and the same is hereby dismissed, and the United States have its costs expended herein. Costs taxed at $23.12.

October 21st, 1940.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Oct. 21, 1940. [335]

[Title of District Court and Cause.]

NOTICE

To:

Frank J. Hennessy, Esq.,
United States Attorney,
Post Office Building,
San Francisco, California.

Ralph E. Hoyt, Esq.,
District Attorney, Alameda County,
Court House Building,
Oakland, California.

E. J. Foulds, Esq.,
65 Market Street,
San Francisco, California.

You are hereby notified that on October 21st, 1940, a decree was entered of record in this office in the above-entitled case.

WALTER B. MALING,
Clerk.

San Francisco, California, (a)
October 22nd, 1940. [336]

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND DISBURSEMENTS

Disbursements

Marshal's fees	$ 2.62
Clerk's fees	10.00
Reporter's fees	.....
Docket fee	10.00
Examiner's fees	.....
Witness fees	.....
Oath to this cost memo	.50
	$23.12

Costs taxed in the sum of $23.12.
Oct. 28, 1940.

WM. J. CROSBY,
Deputy Clerk.

United States of America,
Northern District of California—ss.

William E. Licking, being duly sworn, deposes and says: That he is the Assistant U. S. Attorney in the above-entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements; that the items in the above memorandum contained are correct; that the said disbursements have been necessarily incurred in the said cause; and that the services charged therein have been actually and necessarily performed as therein stated.

(Seal) WILLIAM E. LICKING.

Subscribed and sworn to before me this 24th day of October, A. D. 1940.

J. W. GROSSMAN,
Deputy Clerk, United States District Court, Northern District of California. [337]

To Hon. Ralph E. Hoyt, District Attorney, Alameda County, California.

You will please take notice that on Monday, the 28th day of October, A. D. 1940, at the hour of 10 o'clock A. M., U. S. Attorney will apply to the clerk of said Court, to have the within memorandum of costs and disbursements taxed, pursuant to the rule of said Court, in such case made and provided.

.....

Attorney for United States.

Service of within memorandum of costs and disbursements and receipt of a copy thereof acknowledged this.....day of October, A. D. 1940.

.....

Attorney for County of Alameda.

[Endorsed]: Filed Oct. 25, 1940.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF THE DEFENDANT COUNTY OF ALAMEDA TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT UNDER RULE 73 (b).

Notice is hereby given that the County of Alameda, one of the defendants above named, hereby

appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 21st day of October, 1940.

Dated: January 17, 1941.

Signed:

RALPH E. HOYT,
District Attorney in and for the County of Alameda, State of California.

J. F. COAKLEY,
Chief Assistant District Attorney in and for the County of Alameda, State of California.

ROBERT H. McCREARY,
Assistant District Attorney in and for the County of Alameda, State of California.

CECIL MOSBACHER,
Deputy District Attorney in and for the County of Alameda, State of California.

Attorneys for Appellant
County of Alameda.

Address:
Court House,
Oakland, California.

[338]

Service and receipt of a copy of the attached Notice of Appeal of the Defendant County of Alameda to the Circuit Court of Appeals for the Ninth Cir-

cuit under Rule 73 (b) is hereby admitted this 17th day of January, 1941.

.....

FRANK J. HENNESSY,
Attorney for Plaintiff and Appellee United States of America.

E. J. FOULDS,
Attorney for Defendants Central Pacific Railway Company Southern Pacific Company.

[Endorsed]: Filed Jan. 17, 1941. [339]

[Title of District Court and Cause.]

BOND ON APPEAL

Know all men by these presents: That we, the County of Alameda, a body corporate and politic, and a political subdivision of the State of California, appellant and defendant in the above entitled action, as Principal, and United States Fidelity and Guaranty Company, a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and duly authorized to transact business and issue surety bonds in the State of California, as Surety, are held and firmly bound unto the United States of America, appellee and plaintiff in the above entitled action, in the sum of Two

Hundred Fifty Dollars ($250.00); to which payment, well and truly to be made, we bind ourselves, [340] our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of January, 1941.

Whereas, lately at a District Court of the United States for the Northern Division of California, Southern Division, in a suit pending in said Court, between United States of America, plaintiff, and County of Alameda (a Body Corporate and Politic, and a Political Subdivision of the State of California), Central Pacific Railway Company, and Southern Pacific Company, defendants, a judgment was rendered against the said appellant and defendant County of Alameda on the 21st day of October, 1940, and the said County of Alameda is filing its notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled action,

Now, therefore, the condition of this obligation is such, that if the said County of Alameda shall pay costs if said appeal is dismissed or said judgment affirmed or pay such costs as said appellate court, the United States Circuit Court of Appeals for the Ninth Circuit, may award if the judgment

is modified, then the above obligation shall be void; otherwise to remain in full force and effect.

COUNTY OF ALAMEDA,
a body corporate and politic,
and a political subdivision of
the State of California

[Seal] By GEO. A. JANSSEN
As Chairman of the Board of
Supervisors of the County of
Alameda, State of California,
Principal.

UNITED STATES FIDELITY
AND GUARANTY COM-
PANY

[Seal] By MILDRED DROST
Attorney-in-Fact.
Surety.

State of California,
County of Alameda, ss.

On this 17th day of January in the year of our Lord One Thousand Nine Hundred and forty-one before me, Clarence Laney, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Mildred Drost, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that

she subscribed the name of the United States Fidelity and Guaranty Company, thereto as principal, and her own name as Attorney-in-fact.

In witness whereof, I have hereunto set my hand and affixed my official Seal, at my office in the County and State aforesaid, the day and year in this certificate first above written.

[Seal] (Attorney-in-fact)
CLARENCE LANEY
Notary Public in and for said County of Alameda, State of California. [341]

State of California,
County of Alameda, ss.

On this 17th day of January, 1941, before me, G. E. Wade, County Clerk of the County of Alameda, State of California, and ex-officio Clerk of the Superior Court in and for said County and State, personally appeared Geo. A. Janssen, known to me to be the Chairman of the Board of Supervisors of the County that executed the within instrument and the person who executed the within instrument on behalf of the County therein named and acknowledged to me that said County executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal] G. E. WADE,
County Clerk and ex-officio Clerk of the said Superior Court of the State of California in and for the County of Alameda.

By J. C. HOLLAND
Deputy.

[Endorsed]: Filed Jan. 17, 1941. [342]

[Title of District Court and Cause.]

STIPULATION

The defendant and appellant County of Alameda having included in its designation of the portions of the record proceedings and evidence to be contained in the record on appeal of the above entitled action the reporter's transcript of the testimony of the witnesses Henry S. Pond and Edwin J. Foulds adduced at the trial of said action on the 21st and 22nd days of March, 1940; and

The plaintiff and appellee United States of America having filed its "Cross-Designation of Record on Appeal of Plaintiff and Appellee" wherein said plaintiff and appellee designated certain portions of the reporter's transcript of the proceedings at the trial of said action on the 21st and 22nd days

of March, 1940, to be included in the record on appeal,

It is hereby stipulated by and between the parties hereto by their respective attorneys as follows:

1. The entire reporter's transcript consisting of pages 1 to 104, inclusive, of the proceedings at the trial of said action on said 21st and 22nd days of March, 1940, is to be included in the [343] record on appeal;

2. That the defendant and appellant County of Alameda may file with the above entitled Court a copy of said transcript duly certified by the reporter who reported said proceedings in lieu of the original transcript of said proceedings and may file a copy of said certified copy of said transcript in lieu of a copy of the original transcript of said proceedings; and

3. A copy of this stipulation is to be included in the record on appeal.

Dated February 7th, 1941.

FRANK J. HENNESSY
W. E. LICKING
Attorney for Plaintiff and Appellee United States of America.

E. J. FOULDS
Attorney for Defendants Central Pacific Railway Company and Southern Pacific Company.

RALPH E. HOYT
District Attorney in and for the County of Alameda, State of California.
J. F. COAKLEY
Chief Assistant District Attorney in and for the County of Alameda, State of California.
ROBERT H. McCREARY
Assistant District Attorney in and for the County of Alameda, State of California.
CECIL MOSBACHER
Deputy District Attorney in and for the County of Alameda, State of California.
Attorneys for Defendant and Appellant County of Alameda.

[Endorsed]: Filed Feb. 7, 1941 [344]

[Title of District Court and Cause.]

STATEMENT OF THE POINTS ON WHICH DEFENDANT AND APPELLANT COUNTY OF ALAMEDA INTENDS TO RELY ON APPEAL.

The above entitled Court having made and entered a final judgment in the above entitled action in favor of the plaintiff United States of America

and against the defendant County of Alameda on the 21st day of October, 1940, and the defendant County of Alameda having on the 17th day of January, 1941, taken its appeal from said final judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and the defendant and appellant County of Alameda not having designated for inclusion in the record on appeal the complete record and all the proceedings and evidence in the action, the said defendant and appellant County of Alameda hereby serves upon the appellee United States [345] of America and the defendants, Central Pacific Railway Company and Southern Pacific Company, and hereby files with the above entitled Court a concise statement of the following points on which it intends to rely on said appeal:

I.

That the fact set forth in paragraph V of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The Tidal Canal was not open to navigation" is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact: "The Tidal Canal was navigable in fact".

II.

That the fact set forth in paragraph VII of "Findings of Fact" contained in "Findings of

Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The defendant railroad companies claim no right or title in the Fruitvale Avenue bridge except those rights conferred upon them, or their predecessors, by the decree in United States v. Crooks, et al." is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact: "The defendant railroad companies claim a right to have the Fruitvale Avenue Bridge operated, maintained, repaired and whenever necessary, replaced by the plaintiff under the decree in United States v. Crooks, et al." [346]

III.

That the facts set forth in "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action are erroneous and insufficient in that from the evidence adduced at the trial and from the facts set forth in the stipulations of facts filed in said action the Court erred in not finding the following additional fact: "In the Rivers and Harbors Act, approved June 25, 1910, 36 Stat. 630, c. 382, it is provided, inter alia, as follows:

> 'Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to

transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer.' "

IV.

That the fact set forth in paragraph XI of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made available to adjacent property owners, a twenty-five foot strip of property along each side of the Canal for the construction of wharves and warehouses" is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact:

"Between September 3, 1910, and November 10, 1913, the plaintiff installed electrical operating machinery on the said [347] bridges and thereafter the bridges were operated, maintained and repaired by the County of Alameda instead of the plaintiff.

"In 1910 a harbor line survey was made for San

Francisco Bay for the purpose of establishing harbor lines in said area pursuant to recommendation of the Board of Engineers of the United States Army and authorization of Congress previously made.

"In the making of said survey a survey made prior to 1876 for the purpose of the condemnation action of United States v. Crooks, et al was used in the preparation of the map of harbor lines of the Tidal Canal and San Leandro Point Area as shown on Map, or Sheet, No. 5 (Plaintiff's Exhibit 12).

"The endorsement on the "Maps of San Francisco Bay, Cal., showing Harbor Lines Prepared by the San Francisco Harbor Line Board 1912", including Plaintiff's Exhibit 12, read as follows:

'War Department

"Washington, Jany. 20, 1913.

"The harbor lines shown and described on the accompanying maps, viz: San Francisco Nos. 1, 2 & 3, and San Francisco Bay Nos. 1 to 7 inclus. are approved to supersede all harbor lines previously approved for the localities shown thereon.

ROBERT SHAW OLIVER
Asst. Secretary of War.'

"The harbor lines thus approved were revocable at will by the Secretary of War and were in fact revoked in 1929 by the Secretary of War, at which time they were changed by moving the pierhead lines back to the bulkhead lines so that thereafter

said lines were coterminous with the property lines of the property adjoining the Tidal Canal.

"The area between pierhead and bulkhead lines as shown on Plaintiff's Exhibit 10 was made available for use by adjoining property owners at the pleasure of the plaintiff and without special lease of any kind as shown by the endorsement on the title sheet of Plaintiff's Exhibit 9 reading as follows: [348]

'War Department.

"Washington, June 3, 1913.

'The owners of property abutting the lands included in the right of way acquired by the United States for the Oakland Tidal Canal shown on accompanying Sheet No. 5 are hereby authorized and permitted to occupy, with open-work non-permanent structures for wharf purposes, the portions of the strip of U. S. property fronting their respective properties and situated between the pierhead and bulkhead lines approved Jan. 20, 1913, without special lease or charges of any kind, it being expressly understood that this permission is revocable at any time when this area may be again required for purposes of navigation and shall not be construed as a relinquishment of the Government title to the said right of way.

HENRY BRECKINRIDGE,

Asst. Secretary of War.' "

V.

That the fact set forth in paragraph XVI of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of County of Alameda v. Ross, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460", should have read as follows:

"On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of County of Alameda v. Ross, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460. Said County subsequently agreed to operate said Bridge until March 31, 1940, but in so doing it was agreed that said County waived no rights, expressly retained all rights it might have in the premises, and that the position of the County of Alameda in this suit was not to be prejudiced in any way by such operation. [349] It was further agreed that should said County subsequently agree to operate said Bridge after March 31, 1940, or should said County in any manner continue to operate said Bridge, that said County would thereby waive no rights, but would expressly retain all rights it might have in the premises, and that the position of the County of Alameda in this suit would not be pre-

judiced in any way by such operation or by such extension or extensions of time."

VI.

That the fact set forth in paragraph XVIII of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The Court, in the said case of County of Alameda v. Ross, supra, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909", is incomplete and erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact:

"The Court, in the said case of County of Alameda v. Ross, supra, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909, but said resolution was incorporated in the resolution of the Board of Supervisors of the County of Alameda of November 10, 1913, which latter resolution was before said Court. The United States was notified by the District Attorney of the County of Alameda, as counsel for the County of Alameda, of the filing of said 'Petition for Writ of Mandate' in said action. Copies of all papers filed in said action by both petitioner and respondent, including the stipulation of facts and all briefs, were sent to

and received by the United States Attorney in San Francisco during the proceedings and before the [350] case was submitted."

VII.

That the conclusion of law contained in paragraph I of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That the County of Alameda and the United States entered into a valid, binding contract, as evidenced by the Resolution adopted by the Board of Supervisors of said County on December 6, 1909; by the License issued by the Secretary of War on September 3, 1910; and the Resolution adopted by the Board of Supervisors of said County on November 10, 1913", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the resolution adopted by the Board of Supervisors of the County of Alameda on December 6, 1909, the license issued by the Secretary of War on September 3, 1910, and the resolution adopted by the Board of Supervisors of said County on November 10, 1913, did not constitute a valid contract and that neither the County of Alameda nor the United States is now or has ever been bound thereby.

VIII.

That the conclusion of law contained in paragraph II of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That under said contract the said County of Alameda is obligated to maintain, operate, repair, or rebuild said Fruitvale Avenue bridge.", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set [351] forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that there not being now and never having been a valid and existing contract between the United States and the County of Alameda, that the said County of Alameda is not now and never has been obligated to maintain, operate, repair or rebuild said Fruitvale Avenue Bridge.

IX.

That the conclusion of law contained in paragraph III of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The County of Alameda is now estopped to set aside its contract with the United States to maintain, operate, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipula-

tions of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda for the said County to maintain, operate, repair or rebuild the said Fruitvale Avenue Bridge is ultra vires and that the said County of Alameda is not now and never has been estopped to set aside the said alleged contract.

X.

That the conclusion of law contained in paragraph IV of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The County of Alameda had and has authority to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge", is [352] erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that neither the County of Alameda nor its Board of Supervisors now has or ever has had the authority to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge.

XI

That the conclusion of law contained in paragraph V of "Conclusions of Law" contained in

"Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "Congress had and has power to authorize the County to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the Congress of the United States has not now and never has had the power to authorize said County of Alameda to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge.

XII.

That the conclusion of law contained in paragraph VI of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge were and are not gifts to a private corporation of public money prohibited by Section 31 of Article IV of the California Constitution", is erroneous [353] in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the expenditures

made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge are and always have been gifts of public money or things of value to individuals and municipal or other corporations, prohibited by Section 31 of Article IV of the Constitution of the State of California.

XIII.

That the conclusion of law contained in paragraph VII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the County of Alameda and the United States does not violate Section 18 of Article XI of the Constitution of California forbidding a County to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the County of Alameda and the United States violates Section 18 of Article XI of the Constitution of the State of California, which said constitutional provision forbids a county's incurring any indebtedness or liability exceeding in any year the income and revenue provided for such year.

XIV.

That the conclusion of law contained in paragraph VIII of [354] "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the United States and the County of Alameda is not void for lack of mutuality", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda is void for lack of mutuality.

XV.

That the Court erred in not concluding as a matter of law that the alleged contract between the United States and the County of Alameda was void for lack of consideration and that neither of said parties is now or ever has been bound thereby.

XVI.

That the conclusion of law contained in paragraph IX of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the United States and the County of Alameda is not void for uncertainty", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts

set forth in the stipulations of fact filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda is void for uncertainty, both because of the cancellation clause contained therein and because of the ambiguity of its provisions. [355]

XVII.

That the conclusion of law contained in paragraph X of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The courts of the State of California had no jurisdiction to determine substantial rights of the United States in County of Alameda vs. Ross, 32 Cal. App. (2d) 135; 89 Pac. (2d) 460", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the judgment of the District Court of Appeal of the State of California in the matter of County of Alameda v. Ross, 32 Cal. App. (2d) 135, 89 P. (2d) 460, interpreting the statutes, constitutional provisions and case law of the State of California in regard to the powers and limitations of powers of boards of supervisors and counties and setting forth the substantive law of that

State, is binding upon the United States District Court in the present action and that said Court is without authority to interpret said statutes, constitutional provisions and case law or to determine the said substantive law of said State contrary thereto.

XVIII.

That the conclusion of law contained in paragraph XII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That the counter claim of the defendant County of Alameda be dismissed and said defendant County take nothing thereby", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the [356] stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the counterclaim of the defendant County of Alameda should be granted and that the United States is obligated to operate, maintain, repair and when necessary, to rebuild or replace said Fruitvale Avenue Bridge and that the County of Alameda is forever relieved, released and absolved of any obligation, liability, duty or responsibility in connection with the control, operation, maintenance, repair and rebuilding of said Fruitvale Avenue Bridge.

XIX.

That the Court erred in not concluding as a matter of law that the alleged contract between the

United States and the County of Alameda not specifying any time for which said County was bound to maintain, repair and if necessary, replace the Fruitvale Avenue, Park Street and High Street bridges, was contrary to public policy and void and/or that said contract being silent as to the time of its duration was substantially complied with after a reasonable time and/or that said contract having failed to specify the term for which the obligation was to continue, was terminable at the will of either party.

XX.

That the Court erred in not concluding as a matter of law that equity will not enforce perpetual contracts or contracts which are uncertain as to the length of time of performance or compliance as to their terms.

XXI.

That the Court erred in not concluding as a matter of law [357] that equity should not decree specific performance of said alleged contract which is oppressive, unjust and unconscionable.

XXII.

That the Court erred in admitting over the defendant County of Alameda's objection the report prepared by G. H. Mendell, Major of Engineers, and others, dated at San Francisco, California, February 16, 1874 (Rep. Tr. p. 13).

XXIII.

That the Court erred in refusing to admit in evidence the "Stipulation of Facts with Reference

to Offer of Evidence by the Defendant, County of Alameda," together with Exhibit I attached thereto, which said exhibit contained a Statement of Motion for a New Trial on behalf of Defendant Alfred A. Cohen in the matter of United States v. Crooks (lodged March 21, 1940), which said exhibit set forth the testimony of the witness Major G. H. Mendell given at the time of said motion in the matter of United States v. Crooks, et al., which said testimony explained the report of the said Major Mendell of February 16, 1874, and set forth the details of the construction of said Tidal Canal and purposes for which said Tidal Canal was to be constructed and particularly the fact that said Tidal Canal was to be navigable.

XXIV.

That the Court erred in refusing to admit in evidence the "Stipulation of Facts with Reference to Offer of Evidence by Defendant, County of Alameda," to the effect that Major G. H. Mendell, also known as George H. Mendell, Major of Engineers of the United States Army, referred to in the "Stipulation of Facts with Reference to Offer of Evidence by Defendant County of Alameda [358] subject to Objection of Plaintiff as to Materiality" on file herein, was deceased prior to the commencement of this proceeding and during his lifetime was the same party named as defendant in the case of United States v. Crooks, et al., which said Stipulation was lodged in the instant case on the 26th day of March, 1940.

XXV.

That the Court erred in overruling the defendant County of Alameda's motion to strike from the record all testimony of the plaintiff's witness, Henry S. Pond, given on direct examination, which said motion was based on the ground that said evidence was incompetent, irrelevant and immaterial; that it did not involve any of the issues of said case; that it did not establish any consideration for the assumption of control by the County of Alameda of said bridges or any consideration for any alleged agreement between the said County and the United States Government, and that any such purported agreement between said County and said Government was void and illegal because it was beyond the power of the Board of Supervisors and contrary to the Constitution of the State of California in that it would constitute a gift of public funds to private corporations and an expenditure of public moneys in excess of the income provided for any one year (Rep. Tr. pp. 48-49).

XXVI.

The Court erred in limiting the cross-examination of defendant County of Alameda of the plaintiff's witness, Henry S. Pond, in regard to leases by the United States Government of property along the Tidal Canal, to cross-examination concerning leases of lands lying between the High Street and Park Street bridges (Rep. Tr. 58-61). [359]

XXVII.

That the Court erred in ordering that judgment be entered in favor of plaintiff, The United States of America, on "Findings of Fact and Conclusions of Law" for the reason that said "Findings of Fact and Conclusions of Law" are each and every, all and singular contrary to the law and the evidence in the above entitled case and that, therefore, said decree is erroneous and should be set aside and said final judgment should be reversed and that the said United States Circuit Court of Appeals for the Ninth Circuit should order that judgment be entered for the defendant and appellant County of Alameda and that said defendant and appellant County of Alameda should have its costs expended herein.

Dated: January 17, 1941.

RALPH E. HOYT
District Attorney in and for the County of Alameda, State of California.

J. F. COAKLEY
Chief Assistant District Attorney in and for the County of Alameda, State of California.

ROBERT H. McCREARY
Assistant District Attorney in and for the County of Alameda, State of California.

CECIL MOSBACHER
Deputy District Attorney in and for the County of Alameda, State of California.
Attorneys for Defendant and Appellant County of Alameda.

[360]

Service and receipt of a copy of the attached Statement of the Points on which Defendant and Appellant County of Alameda Intends to Rely on Appeal, is hereby admitted this 17th day of January, 1941.

FRANK J. HENNESSY
Attorney for Plaintiff and Appellee United States of America.

E. J. FOULDS
Attorney for Defendants Central Pacific Railway Company and Southern Pacific Company.

[Endorsed]: Filed Jan. 17, 1941. [361]

[Title of District Court and Cause.]

DEFENDANT AND APPELLANT COUNTY OF ALAMEDA'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The above entitled court, having made and entered a final judgment in the above entitled action

in favor of the plaintiff United States of America and against the defendant County of Alameda on the 21st day of October, 1940, and the defendant County of Alameda having on the 17th day of January, 1941, taken its appeal from said final judgment to the United States Circuit Court of Appeals for the Ninth Circuit, the defendant and appellant County of Alameda does [362] hereby serve upon the appellee, United States of America, and the defendants, Central Pacific Railway Company and Southern Pacific Company, and does hereby file with the above entitled District Court a designation of the following portions of the record, proceedings and evidence to be contained in the record on said appeal:

I.

Complaint for Declaratory Judgment, filed as document numbered 1 on January 17, 1940, with the following exhibits attached:

Exhibit I. Decree in Condemnation Proceedings.

Exhibit II. Agreement of March 7, 1901.

Exhibit III. Resolution of Board of Supervisors of Alameda County, December 6, 1909.

Exhibit IV. License.

Exhibit V. Resolution of November 10th, 1913, Accepting License.

Exhibit VI. Notice of September 28, 1939.

Exhibit VII. Notice of July 27, 1939.

II.

Answer of Defendants, Central Pacific Railway Company and Southern Pacific Company filed as document numbered 3 on February 6, 1940.

III.

Answer of defendant County of Alameda to Complaint for Declaratory Judgment filed as document numbered 4 on February 7, 1940, with the following exhibits attached:

Exhibits I. Copy of Agreement made and entered into by and between the United States of America and the County of Alameda, dated the 24th day of October, 1933, concerning the construction of the Park Street Bridge.

Exhibit II. Copy of Agreement made and entered into by and between the United States of America and the County of Alameda dated the 2nd day of August, 1938, concerning the construction of the High Street Bridge. [363]

Exhibit III. County of Alameda, a Body Corporate and Politic and a Political Subdivision of the State of California, Petitioner, vs. Horace P. Ross, as Auditor of the County of Alameda, State of California, Respondent, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460. (As contained in said California Appellate Reports.)

Exhibit IV. Copy of letter dated December 8, 1939, addressed to the Office of the United States District Attorney by attorney for Petitioner in County of Alameda v. Ross.

Exhibit V. Copy of letter dated January 3, 1939, addressed to the office of the United States District Attorney by attorney for Respondent in County of Alameda v. Ross.

Exhibit VI. Copy of letter dated January 3, 1939, addressed to office of the United States District Attorney by attorney for Petitioner in County of Alameda v. Ross.

IV.

Copy of Clerk's Minutes of March 21, 1940.

V.

Agreed Statement of Facts filed on March 21, 1940, together with the following exhibits attached:

Exhibit 1 (a) admitted in evidence in instant case as part of Plaintiff's Exhibit I—Complaint in United States v. Crooks, et al.

Exhibit 1 (b) admitted in evidence in instant case as part of Plaintiff's Exhibit I—Map of Tidal Canal, prepared by United States Army Engineers Office, 1882.

Exhibit 1 (c) admitted in evidence in instant case as part of Plaintiff's Exhibit I—Opinion and Decision in United States v. Crooks, et al.

Exhibit 1 (d) admitted in evidence in instant case as part of Plaintiff's Exhibit I—Findings of Fact and Conclusions of Law in United States v. Crooks, et al.

Exhibit 1 (e) admitted in evidence in instant case as part of Plaintiff's Exhibit I—Decree in United States v. Crooks, et al.

Exhibit 2 admitted in evidence as Plaintiff's Exhibit II—Map of Tidal Canal as of 1909.

Exhibit 3 admitted in evidence as Plaintiff's Exhibit III—Resolution of Board of Supervisors of Alameda County December 6, 1909. [364]

Exhibit 4 admitted in evidence as Plaintiff's Exhibit IV—License, September 3, 1910.

Exhibit 5 admitted in evidence as Plaintiff's Exhibit V—Resolution of Board of Supervisors of Alameda County November 10, 1913.

Exhibit 6 admitted in evidence as Plaintiff's Exhibit VI—Notice of September 28, 1939 from County of Alameda to United States.

Exhibit 7 admitted in evidence as Plaintiff's Exhibit VII—Notice of July 27, 1939 from Central Pacific Railway Company and Southern Pacific Company to United States.

VI.

Plaintiff's Exhibit VIII—Stipulation of Facts with reference to offer of evidence by plaintiff, subject to objection of defendant, County of Alameda, as to materiality filed March 21, 1940, together with Exhibit I—Report of Chief of Engineers AA5 San Antonio Creek, San Francisco Bay, California, attached thereto.

VII.

Plaintiff's Exhibit IX—Title Sheet of Maps of San Francisco Bay, California, showing Harbor

lines prepared by the San Francisco Harbor Line Board, 1912, filed March 21, 1940.

VIII.

Plaintiff's Exhibit X—Map of Tidal Canal, Oakland Harbor, California, showing pierhead and bulkhead lines submitted by San Francisco Harbor Line Board June 11, 1912, approved by Secretary of War June 3, 1913, file Numbered 30-8-35, Sheet 5, filed March 21, 1940.

IX.

Plaintiff's Exhibit XI—Map of Oakland Harbor showing Harbor lines recommended by the Board of Engineer Officers October 11, 1888, filed March 21, 1940.

X.

Plaintiff's Exhibit XII—Map of San Francisco Bay dated April 25, 1918, showing pierhead and bulkhead lines, filed March 21, 1940 [365]

XI.

Stipulation of Facts with reference to offer of evidence by defendant County of Alameda, subject to objection of plaintiff as to materiality, together with Exhibit I—Statement of Motion for a New Trial on behalf of defendant Alfred A. Cohen in the matter of United States v. Crooks, et al., filed on March 21, 1940.

XII.

Copy of Clerk's Minutes of March 22, 1940 (both entries this date).

XIII.

Stipulation of Facts with reference to Offer of Evidence by Defendant, County of Alameda, subject to objection of plaintiff, as to materiality, lodged as document numbered 5 on March 26, 1940.

XIV.

Copy of Clerk's Minutes of March 26, 1940.

XV.

Copy of Clerk's Minutes of April 3, 1940.

XVI.

Copy of Clerk's Minutes of April 10, 1940.

XVII.

Order of April 10, 1940, denying defendant's motion to receive into evidence testimony of Major Mendell.

XVIII.

Notice dated April 11, 1940, of order denying defendant County of Alameda's motion to receive into evidence testimony of Major Mendell.

XIX.

Copy of Clerk's Minutes of June 27, 1940.

XX.

Order of July 9, 1940, that judgment be entered in favor of plaintiff on Findings of Fact and Conclusions of Law to be filed together with costs. [366]

XXI.

Notice dated July 10, 1940 of order that judgment be entered in favor of plaintiff on Findings of Fact and Conclusions of Law.

XXII.

Proposed Findings of Fact and Conclusions of Law lodged July 16, 1940.

XXIII.

Defendant County of Alameda's Proposed Amendments and Additions to Findings of Fact and Conclusions of Law lodged July 22, 1940.

XXIV.

Proposed Supplemental Conclusions of Law lodged August 2, 1940.

XXV.

Order of September 14, 1940, that matter be placed on calendar for September 21, 1940, for settlement of Findings of Fact and Conclusions of Law.

XXVI.

Notice dated September 16, 1940 of order that matter placed on calendar for September 21, 1940, for settlement of Findings of Fact and Conclusions of Law.

XXVII.

Copy of Clerk's Minutes of September 21, 1940.

XXVIII.

Findings of Fact and Conclusions of Law filed as document numbered 15 on October 10, 1940.

XXIX.

Copy of direction for the entry of judgment in favor of plaintiff on Findings of Fact and Conclusions of Law.

XXX.

Copy of decree entered of record October 21, 1940.

XXXI.

Copy of endorsement showing entry of decree of record on October 21, 1940. [367]

XXXII.

Notice dated October 22, 1940, that a decree was entered of record on October 21, 1940.

XXXIII.

Memorandum of costs and disbursements filed as document numbered 17 on October 25, 1940.

XXXIV.

Notice of Appeal of Defendant and Appellant County of Alameda to the United States Circuit Court of Appeals for the Ninth Circuit dated January 17, 1941, filed January 17, 1941.

XXXV.

Defendant and Appellant County of Alameda's Designation of Contents of Record on Appeal, filed January 17, 1941.

XXXVI.

Statement of Defendant and Appellant County of Alameda of the Points on which it intends to Rely on the Appeal, filed January 17, 1941.

XXXVII.

Copy of Bond on Appeal, filed by Defendant and Appellant County of Alameda on January 17, 1941.

Dated: January 17, 1941.

RALPH E. HOYT
District Attorney in and for the County of Alameda, State of California.

J. F. COAKLEY
Chief Assistant District Attorney in and for the County of Alameda, State of California.

R. H. McCREARY
Assistant District Attorney in and for the County of Alameda, State of California.

CECIL MOSBACHER
Deputy District Attorney in and for the County of Alameda, State of California.

Attorneys for Defendant and Appellant County of Alameda.

[368]

Service and receipt of a copy of the attached Defendant and Appellant County of Alameda's Designation of Contents of Record on Appeal is hereby admitted this 17th day of January, 1941.

FRANK J. HENNESSY
Attorney for Plaintiff and Appellee United States of America.

E. J. FOULDS
Attorney for Defendants Central Pacific Railway Company and Southern Pacific Company.

[Endorsed]: Filed Jan. 17, 1941. [369]

[Title of District Court and Cause.]

DEFENDANT AND APPELLANT COUNTY OF ALAMEDA'S SUPPLEMENTAL DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

The above entitled court, having made and entered a final judgment in the above entitled action in favor of the plaintiff United States of America and against the defendant County of Alameda on the 21st day of October, 1940, and the defendant County of Alameda having on the 17th day of January, 1941, taken its appeal from said final judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and having on said date served upon the appellee, [370] United States of America, and the defendants Central Pacific Railway Company and Southern Pacific Company, and filed with the above entitled District Court a designation of the portions of the record, proceedings and evidence to be contained in the record on said appeal, the defendant and appellant County of Alameda does

hereby serve upon the said appellee, United States of America, and the said defendants, Central Pacific Railway Company and Southern Pacific Company, a supplemental designation of the following additional portions of the record, proceedings and evidence to be contained in the record on said appeal:

I.

Reporter's transcript of the testimony of the witnesses Henry S. Pond and Edwin J. Foulds adduced at the trial of the above entitled action on the 21st and 22d day of March, 1940.

II.

Defendant County of Alameda's Objections to Plaintiff's Supplemental Conclusions of Law.

III.

Defendant and Appellant County of Alameda's Supplemental Designation of Contents of Record on Appeal.

Dated: January 22, 1941.

RALPH E. HOYT
District Attorney in and for the County of Alameda, State of California.

J. F. COAKLEY
Chief Assistant District Attorney in and for the County of Alameda, State of California.

ROBERT H. McCREARY
Assistant District Attorney in and for the County of Alameda, State of California.
CECIL MOSBACHER
Deputy District Attorney in and for the County of Alameda, State of California.
Attorneys for Defendant and Appellant County of Alameda.

[371]

Due service and receipt of a copy of the attached Defendant and Appellant County of Alameda's Supplemental Designation of Contents of Record on Appeal is hereby admitted this 24th day of January, 1941.

W. E. LICKING
Asst. U. S. Atty.
Attorney for Plaintiff and Appellee United States of America.
E. J. FOULDS
Attorney for Defendants Central Pacific Railway Company and Southern Pacific Company.

[Endorsed]: Filed Jan. 24, 1941. [372]

[Title of District Court and Cause.]

CROSS-DESIGNATION OF RECORD ON APPEAL OF PLAINTIFF ANND APPELLEE

The plaintiff and appellee hereby designates the following portions of the record, proceedings and evidence to be included in the record on appeal in addition to the portions designated by the defendant and appellant County of Alameda:

(a) Testimony of Henry S. Pond taken at the trial of this cause on March 21 and 22, 1940;

(b) Testimony of E. J. Foulds taken at the trial of this cause on March 22, 1940;

(c) Colloquy of counsel in regard to the admissibility of certain evidence starting page 13, line 5, and ending at page 24, line 27, of the Reporter's Transcript;

(d) This cross-designation.

FRANCIS M. SHEA
Assistant Attorney General.
FRANK J. HENNESSY
United States Attorney.
SIDNEY J. KAPLAN
Special Assistant to the Attorney General.
BRICE TOOLE
Attorney, Department of Justice.
W. E. LICKING
Assistant United States Attorney.

[Endorsed]: Filed Jan. 27, 1941. [373]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 373 pages, numbered from 1 to 374, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of United States of America, vs. County of Alameda (a Body Corporate and Politic, and a Political Subdivision of the State of California No. 21467-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Fifty-four and 05/100 Dollars ($54.05) and that the said amount has been paid to me by the Attorneys for the appellant herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of February, A. D., 1941

[Seal] WALTER B. MALING,
Clerk.

C. C. EVENSEN,
Deputy Clerk. [374]

[Title of District Court and Cause.)

REPORTER'S TRANSCRIPT

APPEARANCES

For the Government:

FRANK J. HENNESSY, ESQ.,
United States Attorney; by
W. E. LICKING, ESQ.,
Assistant United States Attorney;
BRICE TOOLE, ESQ.,
Attorney, Department of Justice.

For defendants Southern Pacific Company and Central Pacific Railway Company:

E. J. FOULDS, ESQ.

For Defendant County of Alameda:

RALPH E. HOYT, ESQ.
District Attorney for the County of Alameda; by
J. F. COAKLEY, ESQ.
Chief Assistant District Attorney;
ROBERT H. McCREARY, ESQ.
Deputy District Attorney; and
CECIL MOSBACHER, Deputy District Attorney. [376]

Thursday, March 21, 1940

The Court: Who is appearing for the United States?

Mr. Toole: I am, your Honor. I expected Mr. Licking to introduce me this morning. I do not see him in court.

The Court: Is he not going to be present?

Mr. Toole: I expected him to be, but he is in another matter. I am attorney for the Department of Justice and have been admitted to this court, some years ago.

The Court: Do you mind giving me your name?

Mr. Toole: Brice is the first name, Toole.

The Court: You have been admitted in this district before?

Mr. Toole: Yes, your Honor; about ten years ago. I have not practiced here since.

Mr. Coakley: My name is Mr. Coakley.

The Court: Your first name?

Mr. Coakley: Frank.

The Court: You may proceed.

Mr. Coakley: And my associates are Miss Cecil Mosbacher and Mr. Robert H. McCreary of the District Attorney's office, Alameda County; and they are admitted to practice in this court.

The Court: They have been admitted heretofore.

Mr. Coakley: Yes, your Honor.

Mr. Foulds: My name is E. J. Foulds. I represent certain defendant railroad companies.

The Court: And your initials?

Mr. Foulds: E. J. Foulds.

Mr. Toole: May it please the Court, this is an action on a contract which was brought by the United States against the County of Alameda and against the defendant railroad companies to have the rights of the various interests of the parties defined and declared [377] and asking for specific performance by the companies to the contract. The

facts giving rise to the controversy are as follows:

In 1876, the United States instituted condemnation proceedings to acquire a right of way for what is now known as Tidal Canal of Oakland Estuary, which lies between the cities of Oakland and Alameda. The County of Alameda and the railroad companies were defendants in that proceeding. The decree in that condemnation action was entered in 1882, and that decree provided, among other things, that the United States construct and keep in repair suitable bridges across the Tidal Canal at the places where public roads and railroad rights of way were then situated. After the conclusion of the condemnation proceedings, the United States constructed the Tidal Canal and built bridges at Fruitvale Avenue and Park Street. These bridges were equipped with only hand-operated machinery. The work was completed in 1903. In 1909, I might say or thereabouts, the shores of the canal were not open to the construction of wharves, docks and warehouses. In 1909, the Board of Supervisors of Alameda County adopted a resolution in which the County offered to assume the burden of the maintenance, operation and replacement of the bridges which was imposed upon the United States by the original decree provided the United States would equip the bridges with electrical operating machinery and the United States would establish harbor lines and make the water canal open to adjacent property owners. That work was done by the United States; and in 1910, the Secretary of War issued a revocable license

turning the three bridges over to the County. The license was accepted by the County by resolution adopted by the Supervisors on November 10, 1913, and the County thereafter operated and maintained the bridges.

The Park and High Street bridges have been recently rebuilt by the County and the United States, and are not involved in the present controversies. [378]

On September 28, 1939, the County notified the United States that it intended to cease its operation of the Fruitvale Avenue bridge; and on July 27, 1939, the railroad companies notified the United States that if the County refused to further operate the Fruitvale Avenue bridge that the railroad companies expected the United States to do so under the original condemnation decree. The Fruitvale bridge is a combination vehicular, pedestrian and railroad bridge.

Under these facts, the United States contends that the resolution of the Board of Supervisors of the County in 1909 was a valid offer of a county to operate, maintain and renew the bridges in consideration of the improvements by the United States, which improvements were requested by the County and made by the United States. The United States further contends a valid and enforceable contract came into existence under which the County is obligated to maintain, repair and operate the bridge,—the Fruitvale Avenue bridge. The United States further contends that the County is now

estopped from denying the validity of the contract. We have probably all the facts stipulated to, as your Honor can see; but from this statement there are a few things in dispute, and both the County and the United States propose to offer some evidence; and I think, so your Honor will have the details in mind, it might be well if I read the stipulation to the Court so that the Court would know the exact position of both parties. That is the original stipulation there. Most of those are exhibits; but the stipulation is fourteen to fifteen pages.

The Court: It is quite a stipulation; it is fourteen pages. If you desire to read it, you may do so; it may clarify it.

Mr. Toole: I believe it would be, to lay the foundation for the evidence being submitted by both sides. Starting with paragraph II, we merely state that the County of Alameda is a political subdivision of the State of California; and the railroad companies are corporations authorized and licensed to do business within the state. [379]

Paragraph IV is a description of San Francisco Bay, with which your Honor is undoubtedly familiar and we need not read that. I might start with paragraph V on page 3:

"In the year 1874 Congress enacted the Rivers and Harbors Act for that year, in which the sum of $100,000 was appropriated 'for the improvement of Oakland harbor;' to be expended under the direction of the Secretary of War."

That is the first appropriation having to do with this particular work. In 1876, as I stated in my opening statement, the United States commenced this condemnation proceeding, and a copy of the complaint, map of Tidal Canal, opinion and decision, findings of fact and conclusions of law, and the decree in the condemnation proceedings are attached to the stipulation.

It is then stipulated that that proceeding was prosecuted through to conclusion; and, on page 5 of the stipulation, I would like to invite your Honor's attention particularly to the provision of the decree in the condemnation proceedings that the defendants County of Alameda, the Central Pacific Railroad Company, Charles Heinecke and S. A. Smith, not having claimed damages, no damages were awarded to them.

"It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff, the United States, at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the lines of said canal."

At that time, of course, that was dry land there.

Starting with paragraph VII:

"After said decree of condemnation, the United States constructed said Tidal Canal to the extent shown on a map hereto attached and marked Exhibit 2 and thus by reference is incorporated [380]

herein and made a part hereof, and constructed, and until November 17, 1913, maintained and operated highway drawbridges at Park Street and High Street, and a combination railroad, vehicular and pedestrian drawbridge at Fruitvale Avenue. Although said map is dated 1912, said map actually shows the conditions of said Tidal Canal and of said bridges as they existed prior to 1909."——

I might stop there and invite your Honor's attention to the fact it was in 1909 the County made its offer to accept the bridges; and the map which is attached to the stipulation shows the condition of the canal and bridges at that time.

"—The Park Street bridge was completed in 1891; the High Street and Fruitvale Avenue bridges were completed in 1901 and said construction of said Tidal Canal was completed in 1903.

"The bridges were constructed as drawbridges of the swing type, turning or pivoting horizontally upon central piers, and were equipped with hand-operated machinery. It took approximately thirty minutes to open and thirty minutes to close each of these bridges. After these bridges were equipped with electrical operating machinery, as hereinafter set forth, it took from two to three minutes to open, and the same time to close each of said bridges.

"Prior to said installation of electrical operating machinery the United States did not regularly operate said bridges, but did, on occasions, open and close them on request of private interests for the passage of vessels; private interests on occasions

also opened and closed said bridges on their own responsibility for the passage of vessels which could not clear said bridges when closed; and boats, barges and scows which could clear said bridges when closed plied up and down said Tidal Canal."

The next two paragraphs show that prior to the condemnation proceedings that railroad companies owned a right of way at Washington Avenue; that at some time subsequent, in 1901, the United States and [381] the railroad companies entered into an agreement whereby the United States paid the railroad company $50,000 in consideration of the railroad's abandonment of the Washington Avenue line. That is not particularly important to the case now before the Court.

Now, on December 6, in paragraph X, at page 7:

"On December 6, 1909, the Board of Supervisors of Alameda County adopted a resolution, a full and true copy of which is hereto attached and marked Exhibit 3 and thus by reference is incorporated herein and made a part hereof."

Your Honor will find Exhibit 3 at page 93 of the stipulation. That is the offer of the County.

"Resolution of the Board of Supervisors of the County of Alameda, State of California, Accepting Park Street, Fruitvale Avenue and High Street Bridges.

"Whereas, there exists in the County of Alameda, State of California, over and across the United States Tidal Canal, certain draw bridges commonly known as the Park Street Bridge and Fruitvale

Avenue Bridge, and the High Street Bridge, all of which bridges were constructed over said canal by, and belong to, and are the property of, the United States of America; and

"Whereas, no provision has ever been made for the operation of said bridges by the United States Government; and

"Whereas, that portion of said canal between said bridges has never been open to navigation; and

"Whereas, the requirements of commerce and shipping would be materially benefited by the operation of said bridges, and the opening of said canal to navigation in such manner as to permit the passage of vessels in said canal; and

"Whereas, Lieutenant Colonel John Biddle, U. S. A., in his report upon the improvement of rivers and harbors in the First San Francisco, California Districts, has recommended that the bridges [382] hereinbefore referred to, to-wit, the High Street Bridge, Fruitvale Avenue Bridge and the Park Street Bridge be turned over to the County of Alameda, provided that the County of Alameda thereafter assume all cost of repair, operation and replacement when necessary; and,

"Whereas, the Honorable Joseph R. Knowland, Congressman from the Third District of California, has succeeded in securing the recommendation of the War Department that permission be given to turn these bridges over to the County of Alameda; and,

"Whereas, the City of Alameda, acting by and through its regularly constituted authorities thereunto duly authorized, has agreed to supply electric power for the operation of said bridges hereinabove referred to for the period of five years, without cost to the said County of Alameda, now, therefore——"

The Court: (Interrupting) Where are you reading from?

Mr. Toole: I am now reading from page 94.

The Court: I went back to see the map. After that, I didn't know where you were reading from. I saw the map giving the three bridges and showing the canal.

Mr. Toole: Page 94:

"Be It Resolved that the County of Alameda, by and through its Board of Supervisors thereunto duly authorized, hereby agrees to accept said bridges, to-wit: The said Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge and to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges, and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the waterfront of the tidal canal and establish [383] harbor lines so as to permit the construction of wharves and docks—"

The copy of the resolution being signed and so forth.

Now, in paragraph XI of page 7 of the stipulation, it sets forth the provisions of the Rivers and Harbors Act of June 25, 1910, under which the Secretary of War was authorized to do this work and turn the bridges over to the County. On September 3, 1910, the Secretary of War issued a license to the County, after this work was done, reading in part as follows:

"unto the Board of Supervisors of Alameda County, California, a license, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California."

A copy of that license is attached to the stipulation marked Exhibit 4.

On November 10, 1913, the Board of Supervisors of Alameda County adopted a resolution, a full and true copy of which is attached hereto and marked Exhibit 5. Your Honor will find that resolution on page 98 of the stipulation—rather, on the page following, 99. I won't read this whole thing, except to invite the Court's attention to the fact that the resolution of November 10, 1913, recites the original resolution of December 6, 1909, whereby the County agreed to assume the bridges provided the United States would do certain work, and recites that that work was done.

On page 100, your Honor will find a statement of that resolution that:

"Whereas, the United States has put all three bridges in condition for operation of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished bridge-tenders' houses and highway gates; and, also, overhauled all old machinery and put it in good order for operation, under the new conditions as required [384] by paragraph 3 of said License, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

Be it resolved that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the said three bridges—"

I am now on page 8 of the stipulation, paragraph XIV, which sets forth that after that the bridges were operated, repaired and maintained at the expense of said County and have been so repaired, maintained and operated except that the bridges at Park Street and High Street have been reconstructed and are now operated, repaired and maintained under other arrangements between the United States and said County which are of no significance to the present controversy.

Paragraph XV sets forth the total cost to the United States for the repair and electrification of the three bridges as $21,358.80. It also sets forth the cost of operating the bridges, that is, the cost paid by the County for operating the bridges for the fiscal year 1913-14 to the present time, as far as the Fruitvale Avenue Bridge is concerned, and up to

the period of reconstruction of the Park and High Street Bridges. The total cost paid by the County,—page 9,—for maintaining is seven hundred three odd thousand dollars. This paragraph also agrees with the statement that:

"Subsequent to the end of the fiscal year 1938-39 the average cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge has been approximately One Thousand Dollars ($1,000.00) per month, and the cost of replacing this Bridge is estimated to be approximately One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00.)" [385]

Now, then, the last paragraph, page 9, your Honor will find this statement:

"The total cost of maintaining, operating or replacing said Bridges since November 17, 1913, has exceeded the income and revenues provided for the fiscal year 1913-14, or any fiscal year prior thereto, and the expenditure was not assented to by two-thirds of the qualified electors of the County of Alameda voting at an election held for that purpose.

"In the fiscal year 1913-14, and in each fiscal year thereafter, the income and revenue provided by the County of Alameda for each such fiscal year was sufficient to pay for the maintenance and operation of said Fruitvale Avenue Bridge for each such one (1) fiscal year."

The same statement as to the other two bridges up to the period of reconstruction; in other words, the County at no time had available the total cost of

operating these bridges, but it did have available each year the cost of maintaining and operating the bridges for each particular year.

Paragraph XVI of the stipulation describes the Fruitvale Avenue Bridge as a combination railroad, vehicular and pedestrian swing span drawbridge, built upon a single concrete center pier; and that the railroad tracks of the Central Pacific Railroad Company and its lessee the Southern Pacific Company are integral and inseparable parts of the bridge.

Paragraph XVII, beginning page 11, has to do with the growth of the cities of Oakland and Alameda, and a description of the growth of industry, shipping and commerce, in that County.

Now, on page 12, Paragraph XVIII:

"On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of County of Alameda v. Ross, 32 Cal. App. (2d) 135,—" [386]

"A full and true copy of said notice is hereto attached and marked Exhibit 6 and thus by reference is incorporated herein and made a part hereof. Said County has since agreed to operate said Bridge until March 31, 1940, but in so doing it has waived no rights, has expressly retained all rights it may have in the premises, and the position of the County of Alameda in this suit is not to be prejudiced in any way by such operation. In the event that said County subsequently agrees to operate said Bridge

until a time after March 31, 1940, or extends said period from time to time, it will waive no rights, will expressly retain all rights it may have in the premises, and the position of the County of Alameda in this suit is not to be prejudiced in any way by such operation or by such extension or extensions of time."

Paragraph XIX alleges the notice served by the Railroad Companies on the United States.

Paragraph XX, page 13, refers to the case of the County of Alameda versus Ross, which held the alleged license agreement now before this Court to be void.

"The 'Petition for Writ of Mandate' was filed originally in the Supreme Court of the State of California on November 25, 1938. On November 28, 1938, said Supreme Court transferred the above entitled matter to the District Court of Appeal of the Third Appellate District of the State of California for hearing and determination. The decision was duly entered on April 12, 1939. On May 19, 1939, a Petition to the Supreme Court of the State of California for hearing after said decision was filed in said Supreme Court. Said application to have the cause heard in the Supreme Court after said judgment was denied by the Supreme Court on June 1, 1939. The Court, in the said case of County of Alameda v. Ross, supra, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909." [387]

That was the original resolution offering to accept the bridges; but the United States was notified, by mailing to the United States Attorney a copy of the petition for a writ and a stipulation of facts and the briefs.

Mr. Toole: I have here a report prepared by G. H. Mendell, Major of Engineers, and others, dated San Francisco, California, February 16, 1874, which counsel has stipulated is what it purports to be, without further identification, which is offered in evidence for the purpose of showing the purposes of building the Canal. It is the first report of the engineers' office in connection with the construction of the Tidal Canal. Have you any objection, Mr. Coakley?

Mr. Coakley: If your Honor please, we do object that it is immaterial and irrelevant; however, we feel that we have no particular objection to it going in if the testimony of the man who made the report, who was in charge of this project, goes in with it, which explains the report. The report with respect to the Canal construction was very, very general; and, in view of the testimony of Major Mendell, who made this report, who was in charge of the construction of the Canal, and to the detail of construction and the manner in which it was to be constructed, that should be admitted with it. If counsel has no objection to the testimony of Major Mendell given in that condemnation proceeding in connection with this report, we have no objection to this report going in. We feel that both should go in.

Mr. Toole: The testimony of Mendell to which counsel refers was testimony given by him in the condemnation suit. In the condemnation suit, findings of fact were made and a decree was entered; and I don't believe the testimony of any witness having to do with the value of land or what the construction details might be, in that case, can be at all material in this case. The Major not only testified as to—and the complaint incidentally has been stipulated to,— [388] that is, the complaint in the condemnation proceedings,—and the complaint sets forth the purposes of the Tidal Canal, why it was to be built. I might read this statement from the complaint on page 24 of the stipulation:

"That the United States of America is duly authorized and empowered to improve Oakland Harbor, in said County and State, in the interest of commerce, and for that purpose it becomes and is necessary to turn the water from San Leandro Bay or estuary through a tidal canal into the head of San Antonio estuary, so as to increase the tidal flow into and through said San Antonio estuary, which forms said Oakland Harbor, for the purpose of removing the sediment from the same, and thereby increasing the depth of water, and improving said Oakland Harbor."

And it became necessary to have the strip of land above described,—that is on page 24 of the stipulation. That is an allegation from the complaint in the condemnation proceedings. What counsel proposes to offer is testimony of a witness who tes-

tified in the condemnation proceedings; which I believe is entirely immaterial in this case. What I have just offered is the report to the Chief of Engineers having to do with San Antonio Creek, San Francisco Bay, California, report of the Board of Engineers, which is not referred to in the complaint.

The Court: The objection they are making is covered by the fact that he testified, and it is placed in this new record?

Mr. Toole: That is right. I might say that testimony is— He was asked if he made a report,—this report here; and he answered "Yes"; and that report was offered in evidence, in the condemnation proceedings, and received in evidence. The witness whose testimony is now offered testified in the condemnation proceeding, tried over 50 years ago, and in which a decree has been entered 50 years ago, and his testimony would be absolutely valueless for any purpose in this case. It cannot be used to modify the decree or findings of [389] the Court or fix value, because everything was done in that case.

The Court: What is in the proposed exhibit that is lacking that you want to get in before the Court? What is the point that you made?

Mr. Coakley: Counsel offers a report in evidence, —a report of the Board of Engineers; and this report in connection with the construction of the Tidal Canal was testified to by Major Mendell. In that testimony, he testified that the report was very general and did not contain all detail as to the manner

of construction and improvement; and in his testimony he amplified that detail and went on and said how the Canal was being constructed, described it, and said something about the purposes, and said something about what kind of bridges would be constructed across the Canal; and so we feel that the testimony given in conjunction with the report in the condemnation proceedings is involved here, that the two should go together, because the report obviously——

The Court: In what way does it differ from the report, to enhance it? What is it that gives value to it?

Mr. Coakley: For instance, the report very generally says that bridges would probably have to be constructed across the Canal. Now, the testimony in conjunction with the report of Major Mendell was that the bridges would have to be constructed and they would have to be drawbridges because it was contemplated that this canal would be a navigable waterway, and one of the purposes would be navigation as well as improvement of the harbor and of getting and securing the effect of tides going in there. Those things do not appear in the report; but the testimony of Major Mendell does appear in the condemnation proceedings, which is referred to in the stipulation. The stipulation says that the Tidal Canal was constructed for the purposes set forth in the condemnation proceeding. We submit that the testimony—that the record of the testimony of Major [390] Mendell, who was in

charge of the construction of the Canal, and the plans connected with it were part of those proceedings referred to in the stipulation. If the report goes in, the testimony should go in with it. The report is ambiguous on its face. The testimony is in order to clarify the uncertainty and ambiguity appearing in the report, the decree and findings in United States versus Crooks, the condemnation case.

Mr. Toole: I think that last statement of counsel perhaps states my objection better than I can state it myself, because the complaint, the opinion and decision, the findings of fact, and conclusions of law, and decree in the condemnation proceedings have been stipulated. Your Honor has all this information before him. Now, counsel says he believes the testimony of Major Mendell should now be before this Court and explain those things; which is practically asking your Honor to retry that whole condemnation proceeding.

The Court: You have stipulated to those issues which are contained in that report? Is that the point you are making?

Mr. Toole: No; we have stipulated these various proceedings in the condemnation proceeding.

The Court: Then, why do you want the report?

Mr. Toole: The report had nothing to do with the condemnation proceedings. It was a report filed by the Chief of Engineers,—a report of the Board of Engineers.

The Court: But you are offering that.

Mr. Toole: Yes. That was the first report made as to the construction of this Tidal Canal,—the first Government report made—and the report that was submitted first to the Chief of Engineers and then, I suppose, to Congress. Congress then appropriated the money for the construction of the Tidal Canal.

The Court: This testimony given by this engineer is not apparently reflected in anything else? [391]

Mr. Toole: Yes, he did; he goes into the question of value.

The Court: It is not reflected in any other document; in other words, it was not made a part. You say that he testified. Does that report form a part of anything you are depending upon?

Mr. Toole: I don't understand you, your Honor.

The Court: Is that report—is it not embodied in the other papers?

Mr. Toole: The report is embodied in Major Mendell's testimony; and I am willing to stipulate Major Mendell's testimony in the condemnation proceedings—for the purpose of identifying this report, this report was offered in that case.

The Court: But you don't want his testimony in that case in this?

Mr. Toole: That is correct.

The Court: On the score of what?

Mr. Toole: For this reason: It seems to me it is practically asking this court to retry the condemnation proceeding. Now, there is the testimony of a great number of witnesses, your Honor. Your Honor has before you the decree in the condemna-

tion proceedings and the findings of fact and the complaint. Now, to put that testimony of a witness in that case in evidence in this case would be, it seems to me, reopening that case.

The Court: No; merely to enlarge the report, is it not, to bring facts not in the report?

Mr. Coakley: To explain the report.

The Court: You are claiming there might be something in the report——

Mr. Toole: I am willing to stipulate this: that the testimony of Major Mendell, where he refers to this report, may go in. I have no objection to limiting it to that.

The Court: But not on the other issues? [392]

Mr. Toole: The issues of value and other things before the Court in the condemnation proceeding.

The Court: Do you understand he is offering you what you want?

Mr. Coakley: No. We think that Major Mendell's testimony should go in, not for the limited purpose of identifying it, but it should go in in its entirety.

The Court: The proceedings themselves are coming in this.

Mr. Coakley: We feel Major Mendell's testimony should go in in its entirety, for whatever connection it may have, explaining this report, describing the manner of the construction of the proposed Canal. The report did not go into detail in that respect. In his testimony, he did, when he said the bridges contemplated would have to be drawbridges and so forth, 400 feet long. They did not put that

in the report, but it did appear in the testimony. In his testimony, he identified the report introduced in the condemnation proceeding, and introduced this report, and said it would involve drawbridges; and so his testimony is needed, I submit, in order to make any sense out of the report.

The Court: In that condemnation proceeding, they covered a certain field. This particular testimony you are asking to have was passed upon in that proceeding. In the findings in those proceedings, I presume they found everything essential or necessary to the case?

Mr. Toole: Yes.

The Court: Therefore, it does not need the testimony of the individual witnesses before the Court now to be brought out if they had sufficient evidence upon which to predicate what they did find. You would want this Court to find something in the condemnation proceedings over and above what was actually found upon the proceedings; is that the point?

Mr. Coakley: No. We say that the findings of fact, conclusions [393] of law and decree and the opinion and decision which are stipulated to as facts in this agreed statement of facts are ambiguous in that they do not go into detail as to the size of the bridges, the specific minute details of construction of bridges, and the construction of the Canal. They simply say, "Good and suitable bridges shall be constructed across the Canal." "Good" and "suitable" obviously are generally broad and

vague, so much so that it needs some clarification. In order to get that, we have to look to the proceedings which the law contemplates; and, in looking to the proceedings, we look to the report and testimony of witnesses, testimony of Major Mendell, as to the facts upon which the Court rendered a decree. The Court, by rendering and passing judgment, took into consideration these items of damage: value of the land to be condemned; severance damage which resulted, if any, from the separation of the land being taken for the Canal, from the land which was left—these elements of damage taken into consideration, and the question of damages or benefits from the construction of the improvements in the manner proposed, which, under the law, Section 1248 of the Code of Civil Procedure, taking into consideration the benefit to be derived from the construction; and in taking into consideration all those benefits, it had before it the testimony of Major Mendell as to the construction of those improvements. Therefore, we say his testimony must be read in connection with this—that is, the Court findings, the opinion and decree,—in order to find or understand the meaning of the decree when it said, "Good and suitable bridges across this Canal."

The Court: In other words, you bind the Court by testimony of a witness who testified before the Court, even though the findings do not recite what type of bridges they were to be. In other words, he recommended a certain type of bridges; and

you would enlarge the findings to embrace what he testified—That is it, is it not? [394]

Mr. Coakley: Yes, your Honor; that is proper.

The Court: And that is what you are opposing?

Mr. Toole: Yes.

The Court: You feel it has been enlarged in the findings and the decree; that must be within the scope of what was found; and this would be endeavoring to expand?

Mr. Toole: For this Court to go behind the decree.

Mr. Coakley: That is not expanding. It simply explains the testimony. The findings are perfectly consistent with the testimony of what happened.

The Court: Let me go to another point: This report you are offering: is it referred to in the condemnation proceedings?

Mr. Toole: Yes. Major Mendell identified the report as the report made by him.

The Court: It was made an exhibit?

Mr. Toole: In the condemnation proceeding.

The Court: Was it recited that that is being referred to in the final decree or findings?

Mr. Toole: No, your Honor.

Mr. Coakley: But his testimony and testimony of other witnesses is referred to; and his testimony included the report.

The Court: You are explaining the findings by this proposed report?

Mr. Toole: No, your Honor.

The Court: Just what are you doing with the report?

Mr. Toole: I am not saying a word about the condemnation proceeding. I was satisfied with the evidence before your Honor.

The Court: He is going to oppose it being received. I am wondering how I shall receive it if it is not a part of the condemnation proceeding; that is, it doesn't form a part by reference or otherwise. How does it come into this hearing,—this [395] report?

Mr. Toole: I am offering this report to show the purpose for which the Government constructed the Tidal Canal as an official record from the Government. Counsel has stipulated it does not have to be further identified. As to whether the report was or was not offered in the condemnation proceeding is entirely immaterial to this case. Here is a report made according to the rules and regulations of the proper department, submitted to Washington, and which was the report that initiated the whole proceeding, the whole building of the Tidal Canal. This report may have been in condemnation proceedings or suits after they built the bridges; but it would not affect my purpose in offering it here.

The Court: Have you proved that was a report that was placed before the County of Alameda, also?

Mr. Toole: No——

The Court: That might be a secret report.

Mr. Coakley; No: it was introduced in the proceedings in the trial. It was so stipulated.

The Court: As the proposed plan?

Mr. Coakley: Introduced in the proceedings, and it is inferentially referred to in the decree and findings.

Mr. Toole: Here is our stipulation in regard to this report:

"It is hereby stipulated by and between the parties hereto by their respective attorneys that the following facts are true, subject to the objection by fendant County of Alameda as to materiality: 1. That the Board of Engineers of the United States Army made a report to Brigadier General A. A. Humphrey, Chief of Engineers, United States Army, with reference to San Antonio Creek, San Francisco Bay, California, dated at San Francisco, California, February 16, 1874; that a copy of said report is attached hereto and by reference incorporated herein and marked Exhibit 1." [396]

It is also stipulated that the dam across the mouth of San Leandro Bay referred to in said report, was never built.

The Court: On what page is this?

Mr. Toole: This is the stipulation I was offering, identifying this report. This report shows the whole history.

The Court: I see what you have done. You are not obligated to anything. You have a stipulation to cover it. I don't have to go into it further. Now, this oral testimony given on this trial you have not so stipulated, and it stands on a different basis than the report.

Mr. Toole: I may say this, your Honor: When the proper time comes, as a matter of defense, counsel may want to offer that testimony of Major Mendell in the condemnation suit. The thing that has brought this to a head is that counsel offered to stipulate——

The Court: I think it is clear enough. This is being offered under the stipulation; and, although being offered, counsel now objects to its being received unless certain testimony is received.

Mr. Coakley: We have another stipulation.

The Court: On the same matter?

Mr. Coakley: Which goes with that.

Mr. Toole: It seems to me the stipulations are separate.

The Court: I don't know until I see it. I am not psychic. I do not see things without reviewing them. You have stipulated to the reception of this; you have omitted on Exhibit 1——

Mr. Toole: But that is just a reference. That stipulation, in fact, is this: that Major Mendell is the same man who testified in the condemnation proceeding, and who made the report; and the exhibit attached to that stipulation to which we have reserved our objection is omitted from his testimony.

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The Court: Is this the main issue you have before the Court here?

Mr. Toole: No. It seems to me that is out of order now.

Mr. Coakley: I would suggest, if the Court please, inasmuch as the two stipulations connect

themselves with this report here, that we file them at this time; and if the Court sees fit to take it under submission as to the admissibility of that evidence, we can discuss that in our briefs.

The Court: No; frankly, as far as I can read, it looks as if the stipulation, the second one you offered, does not make as a prerequisite that the testimony be received if the report is to be received.

Mr. Toole: That is correct, your Honor. It does not.

The Court: In other words, the Government has got from you an absolute right to place in evidence arbitrarily this report; then you in your turn have got from the Government the concession that testimony was given at this trial by this official, without anything that ties you in with the right to have it presented, to merely convince the Court you are entitled to have it presented, which, of course, is another situation. Whether you are entitled or not, apparently the first one is absolute. You don't question that, do you? It will be received.

Mr. Toole: The materiality is only given in the first.

Mr. Coakley: We feel simply if the report goes in——

The Court: In other words, you have agreed to have it go in. There is no qualification.

Mr. Toole: If the Court considers it material.

Mr. Coakley: If the Court considers it material.

Mr. Toole: It seems to me that the proper time for counsel to offer the testimony of Major Mendell

—that stipulation—would be in defense, not to offer it in connection with evidence [398] offered by the plaintiff.

The Court: That may be true. Of course, he wants to be in a position, in the future—I agree with you. My present attitude regarding it is it should be received as an exhibit. It will be number 1; and number 2 would not be received. However, this is only from the bench. I am not settled on that. I am wondering if that should not be one of the problems left with the case, because, on that basis, it would seem to me that your stipulation combined with it permits it to be considered. So far, unless I find from evidence produced that it may become relevant—but, at the present time, the other is not. However, I don't want you to hold I have reached any conclusion definitely, because, as I tried to grasp what your plan is right now, it is my general impression, if it becomes a problem in this case—Bear in mind my tendency is to take that attitude—As to whether or not I do, I assume, without saying, you will brief it or argue the matter later?

Mr. Coakley: I might suggest that, inasmuch as both of our stipulations have been prepared and are in writing, we file them with the Court, like we did the major stipulation.

The Court: I see no objection to that.

Mr. Coakley: And we discuss the admissibility of the testimony there offered and our offer in our briefs.

Mr. Toole: Do I understand the Court the report has been received in evidence?

The Court: No; I can receive it subject to a motion to strike out in case the other evidence is not given. It may be received as Government's Exhibit 1.

Mr. Toole: Pardon me, your Honor; it will be Exhibit No. 8.

The Court: You have already adopted seven of them. I have not given any order to that effect. I would just as soon make this the first, Exhibits 1 to 7, inclusive. [399]

Mr. Toole: The stipulation on the report is Exhibit 8?

The Court: This will be Exhibit 8; and we will adopt the other ones before the Court as bearing the numbers they bear.

Now, we have reached twelve o'clock. I presume we can conclude this this afternoon?

Mr. Toole: The Government has just one witness. I don't think it would take more than a half hour.

The Court: If necessary, we could use tomorrow morning. We will adjourn until two p. m.

(Document marked "Government's Exhibit No. 8.")

PLAINTIFF'S EXHIBIT No. 8

[Title of District Court and Cause.]

STIPULATION OF FACTS WITH REFERENCE TO OFFER OF EVIDENCE BY PLAINTIFF, SUBJECT TO OBJECTION OF DEFENDANT, COUNTY OF ALAMEDA, AS TO MATERIALITY.

It is hereby stipulated by and between the parties hereto by their respective attorneys, that the following facts are true, subject to objection by defendant, County of Alameda as to materiality:

I.

That the Board of Engineers of the United States Army made a Report to Brigadier-General A. A. Humphreyes, Chief of Engineers United States Army, with reference to San Antonio Creek, San Francisco Bay, California, dated at San Francisco, California, February 16, 1874; that a copy of said report is attached hereto and by reference incorporated herein and marked Exhibit 1.

II.

That the proposed dam across the mouth of San Leandro Bay, referred to in said Report, or any dam in connection with the waters referred to in the Report, was never built.

(Plaintiff's Exhibit No. 8—continued.)

Dated: March 21, 1940.

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by J. F. COAKLEY,
Chief Assistant District Attorney for the County of Alameda, State of California
ROBERT H. McCREARY,
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Attorneys for Defendant, County of Alameda.

(Plaintiff's Exhibit No. 8—continued.)

EXHIBIT 1

REPORT OF THE CHIEF OF ENGINEERS.

AA 5.

San Antonio Creek, San Francisco Bay, California.

Report of the Board of Engineers.

San Francisco, Cal., February 16, 1874.

General: The board of officers constituted by Special Orders No. 32, headquarters Corps of Engineers, Washington, D. C., March 24, 1873, for the purpose of making the examination and survey and plan of a harbor for San Antonio Creek, California, provided for in section 2 of the act making appropriations for rivers and harbors, approved March 3, 1873, has the honor to submit the following report:

As a preliminary step to the investigation of this subject, the board caused a map of San Antonio Estuary and Bar, and of San Leandro Bay, to be prepared from the best attainable information.

This map embraces the peninsula between these two bodies of water, the city of Oakland on the north side of San Antonio Estuary, and the marshes and sloughs on the east and south of San Leandro Bay.

The map also shows the depth of water in these two bays, the soundings being referred to the plane of mean low-water, as established by the United States Coast Survey.

The sloping shore is shown, with its depth of water at low-tide, from a point north of the present

(Plaintiff's Exhibit No. 8—continued.)

city of Oakland to a position opposite to the entrance to San Leandro Bay.

The board also caused special surveys to be made:

1st. Of the vicinity of the entrance to San Leandro Bay.

2d. Of a line for a tidal canal, to connect the waters of San Antonio Estuary with those of San Leandro Bay.

Tracings of the map and of the two special surveys, marked No. 1 and No. 2, are inclosed herewith.

The board also caused various borings to be made in order to ascertain the nature of the material with which it will have to deal in executing the suggested improvement of San Antonio Estuary.

Many of these borings are tabulated on the map, and others shown in the sections on that map, and on Nos. 1 and 2.

The board also caused simultaneous tidal observations to be made in San Antonio Estuary and in San Leandro Bay, in order to ascertain if there was a difference in the times of high and low tide in these two bodies of water, or a difference in the elevation of the water above a common 0 for the similar phases of the tides.

The results of these tidal observations are platted on the paper marked 3.

The positions of the two tidal stations are laid down on the map.

These tidal observations show that the water rises a little higher and falls a little lower in San Lean-

(Plaintiff's Exhibit No. 8—continued.)

dro Bay than it does in San Antonio Estuary; the mean difference in the range of the tides of these two bays being about four-tenths (4/10) of a foot.

It will also be observed that the times of high and low water are later in San Leandro Bay than in San Antonio Estuary; the mean difference in time being about one hour.

In considering a "plan of harbor" for San Antonio Estuary, we suppose we are to inquire to what extent this estuary can be developed so as to make it a commercial harbor; the number and character of vessels it could accommodate, if so developed, and the cost of such an enterprise.

After a careful study of our maps and examination of the ground, and all the surrounding circumstances, we have arrived at certain conclusions on these subjects, which we now proceed to state:

The estuary of San Antonio receives the drainage of only a small tract of country to the eastward of the city of Oakland, and having no large stream emptying into it to give a resultant current, it is doubtless slowly filling up by sediment brought into it from the surrounding shores during the rainy season.

The estuary, it will be noticed, spreads out at its upper end, so that it is much wider there than it is lower down.

This upper portion is very shallow, a great part of it being bare at low water.

(Plaintiff's Exhibit No. 8—continued.)

It is the water, however, which this wide but shallow portion of the estuary holds at high-tide, together with that contained in the sloughs and over the adjacent marshes, which scours out a considerable channel in the narrow portions on the ebb-tide when it becomes concentrated.

An examination of the map will show that off the end of Hibbard's wharf, where the channel is narrow, there is a depth of twenty-two feet of water in one place at low-tide.

Again, at the mouth of the arm of the estuary forming Lake Merritt, where it is again narrow, the depth increases, so that we find twenty-three feet in one place at low-water.

Still again, at the entrance of the estuary and for some distance outside of it, we have a depth of water ranging from twelve to eighteen feet at low-water.

But as we go outside, the water flowing out of the estuary is dispersed over a large area, and the depth gradually diminishes until, at the distance of a little more than a mile from the entrance, a bar is formed, having only about two feet of water over it at low-water.

It is a natural inference, therefore, to conclude that it is the scouring effect of the water flowing out of the estuary which maintains a channel of considerable depth wherever the water-way is sufficiently contracted to develop the necessary velocity of current.

(Plaintiff's Exhibit No. 8—continued.)

And we are forced to the conclusion that, if the water of the ebb-tide could be confined to a narrow passage from the entrance of the estuary out to deep water of San Francisco Bay, a channel would be scoured out to that bay, the depth of water in such channel becoming greater as the width of the passage diminished.

We speak of the ebb-current as doing this work, because it is a well-known fact, in relation to tidal harbors, that the greater portion of the scour of channels is done by the ebb-tide. The flood-current has comparatively little influence in scouring out a channel, because it is dispersive, while the ebb-current is concentrative.

The greater scouring effect of the ebb-tide is also due, in this case, to the manner in which the tides rise and fall in the bay of San Francisco; commencing at low-water large, the tide rises to high-water small, then falls to low-water small, then rises to high-water large, then falls to low-water large again.

Thus we have two steps to get from low-water large to high-water large, while we have but one step to get back again from high-water large to low-water large. It is the scouring effect of this large ebb-tide which keeps this channel open, and of considerable depth where it is sufficiently contracted.

We may observe that it is the latter portion of the ebb-current which is the most concentrated, and which produces the greatest scouring.

(Plaintiff's Exhibit No. 8—continued.)

It follows, therefore, that one of the first steps looking to the improvement of the entrance to this estuary is to contract the water-way over the bar.

The best method of making this contraction appears to us to be by two parallel training-walls of stone. The positions of these walls, with their proposed sections, are shown in detail on the map.

In order to afford the necessary room for navigation, these walls are placed one thousand feet apart from center to center of walls.

If it be found in time that a narrower passage will be more easily maintained at the necessary depth, the width can be easily and cheaply reduced by short wing-dams run out on one or both sides of the channel.

It will be noticed that the constructions we propose do not rise to the full height of the tide. We place the top of the two walls at the height of four feet above low-water, so that they will be entirely submerged at high-water. This insures that the estuary will be entirely filled by each high-tide, for the last of the flood will run freely over these walls, while the first part of the flood-tide and the last of the ebb-tide—which latter does the principal work of scouring—are guided and confined between the two walls.

Our borings on the bar at the mouth of San Antonio Estuary show that this bar is composed of hard sand to a depth of two or three feet, but below this there is a stratum of mud, soft sand, and

(Plaintiff's Exhibit No. 8—continued.)

broken shells nearly to the depth of the proposed channel of entrance, to be hereafter described; and below this, in places, hard sand is again found. This is a very favorable condition of things for obtaining a channel across or through this bar, either by dredging or by the action of the current when it is confined.

In fact, we believe, for the reasons already given, that in one or two years after these walls are constructed the current would, without other aid, wash out a channel between them of some twelve or fourteen feet in depth at low water, approximating in width and depth to the present channel in the estuary above.

Such a channel would be permanent, and it could be obtained at much less cost than by dredging.

The work that is necessary to be done to convert San Antonio's Estuary into a good harbor for commercial purposes naturally divides itself into three parts:

1. That connected with the entrance.
2. The harbor proper.
3. A tidal basin.

For the sake of easy reference, we have designated these portions on the map herewith by the letters A, B, C.

The entrance A is bounded on the northern and southern sides by the two submerged "training-walls."

The harbor B is to be inclosed on the Oakland and Alameda shores by bulk-heads, either of wood

(Plaintiff's Exhibit No. 8—continued.)

or stone, filled in behind, so that the entire length of these bulk-heads becomes available as wharves. Vessels lying alongside of these wharves will have their keels parallel to the direction of the currents both of flood and ebb-tides.

The tidal basin C is to be excavated to the depth of two feet below low-water, so that its entire tidal area will be available when the wants of commerce will justify the expenditure. Of course this space may also be excavated to any required depth, and surrounded by a bulk-head, thus converting it also into a commercial harbor.

But this tidal basin, C, even when excavated so as to make its entire tidal prism available for scour, will not be large enough to contain a quantity of water sufficient to open and maintain a wide and deep channel of entrance between the training-walls and in the harbor B.

Rather than incur the heavy expense of dredging out these channels, and the annual cost of maintaining them of the requisite depth, we have sought for a cheaper mode of construction, and one, too, by which the depth of water in the harbor and the approach to it will be preserved without the necessity of constant dredging.

Fortunately, such a plan is almost provided by nature.

If the capacity of the tidal basin C could be greatly increased in size, say, so as to double the present quantity of water flowing into and out of

(Plaintiff's Exhibit No. 8—continued.)

San Antonio Estuary, the escaping water of the ebb-tide in the case supposed would scour out and maintain a channel very much wider and deeper than the present one.

We propose to double the quantity of water flowing into and out of San Antonio Estuary by connecting that estuary with San Leandro Bay by a tidal canal of the proper size to insure the filling and emptying of that bay at each flood and ebb tide. For this purpose a dam across the present mouth of San Leandro Bay will be necessary.

Such a canal and dam are shown in the map herewith.

It will be noticed that this dam is not shown to the full height of high-water. To insure the filling of this bay, we only build the dam to the height of four feet above low-water level, which is the same as the height of the training-walls already described.

The flood-tide when it reaches this height will then flow freely over the proposed dam, and add greatly to the quantity of water entering the bay through the canal.

Of course during the first part of the ebb-tide the water will escape over the top of this dam, but after the water has reached the level of the top of the dam all the remaining water in San Leandro Bay must escape through the canal into San Antonio Estuary.

It is possible that in the future it may be well, in order to add to the scouring effect in San Antonio

(Plaintiff's Exhibit No. 8—continued.)

Estuary, to force all the tidal prism in San Leandro Bay to escape, at least during certain tides, through the canal.

To accomplish this, we have sketched automatic tide-gates on the top of the dam across the entire width of the entrance to San Leandro Bay from shore to shore.

These gates would be so arranged as to let the flood-tide flow freely into the bay, but would close, unless prevented from doing so, the moment of the beginning of the ebb current.

	Cubic feet.
The cubical contents of the tidal prism of San Leandro Bay, as it is at the present time, for a rise and fall of tide of six feet, is equal to	165,000,000
Of the proposed canal	20,000,000
Total additional tidal prism in these two bodies of water	185,000,000

The cubical contents of San Antonio Estuary, as it is at present, are 157,000,000 cubic feet.

So we see that, when the whole tidal prism of San Leandro Bay is forced to flow out through the canal into San Antonio Estuary, the quantity of water escaping through that estuary on the ebb-tide would be considerably more than doubled.

Exactly what effect doubling this quantity of water would have in deepening the channel in San Antonio Estuary and the entrance between the two training-walls it is difficult to say or to calculate.

We could apply the usual hydraulic formulas governing the flow of water in such cases to the new

(Plaintiff's Exhibit No. 8—continued.)

condition of things when the whole tidal prism in San Leandro Bay and the proposed canal are forced to pass through San Antonio Estuary, but we do not think it necessary to encumber this report with them further than to show the result at which we have arrived. To do this, let us examine the circumstances at a single point only—say the mouth of San Antonio Estuary. We will state that—

The area of a cross-section at the mouth of San Antonio Estuary at

high-water mark = 12,302 square feet.

Area at low-water = 5,012 square feet.

2)17,314

Mean area ..... 8,657 square feet.

Comparing this mean section with the tidal prism of the estuary, there results for a 6-foot tide a mean velocity of 0.838 foot per second. Now, when the whole quantity of water flowing out of this estuary is more than doubled, as it will be when the tidal prism of San Leandro Bay and the canal are forced through it, the mean velocity of the escaping tide will be fully doubled, and the water will begin to scour for itself a deeper and wider channel, until an equilibrium is established between the strength of the current and the resistance of the particles to be moved. Then the size of the channel will become fixed, and its depth will remain permanent.

Exactly what depth of water would be obtained by the proposed constructions is a question, as we

(Plaintiff's Exhibit No. 8—continued.)

have already observed, which it is impossible to foresee. But as the present depth of water at the point we have chosen for illustration is 14 feet at low water at the present time, and as the material to be removed in order to obtain a deeper channel is generally soft mud, like that on the present bottom and sides of the channel, we think it entirely reasonable to conclude that, when the tidal currents flowing through this channel are fully doubled in volume, the depth of the channel will be increased 18 or 20 feet at low-tide.

The same remarks apply to the depth of water in the entrance between the two training-walls, but with still greater force; for the material to be moved there, except for 2 or 3 feet on the surface, is of the same general character as that in the estuary, and the scouring effect there would vary as the quantities of tide-water that lay above any given section-line.

The order in which this work should be executed would be as follows:

First. Construct the two submerged training-walls, beginning at the shore and carrying them out simultaneously, terminating them about the points indicated on the drawing.

Within a year after these walls shall have been completed, with perhaps a little dredging to break the hard sand on the surface so as to direct the course of the scour downward into the soft material, instead of leaving it spread out over the en-

(Plaintiff's Exhibit No. 8—continued.)

tire surface of harder material, we are of the opinion that a channel would be scoured out between these walls of some 12 to 14 feet in depth at low-tide. This of itself would be a great advantage to San Francisco and Oakland, as well as to the traveling community generally. For then all ferry-boats, river and bay steamers could pass freely from San Francisco or other points on the bay to wharves at Oakland, instead of landing, as they now do, at the end of a wharf some two miles from shore, and carried thence on cars over a wooden bridge, which, however, carefully watched, many persons fear will some day or other be the cause of a serious accident.

As there are now some sixty-seven thousand overland passengers and two million ferry passengers for Oakland and the neighborhood passing over this long bridge yearly, the importance of the consideration above mentioned will be manifest.

Second. Excavate the canal between San Antonio Estuary and San Leandro Bay.

Third. Construct the dam at the mouth of San Leandro Bay.

Fourth. Excavate the tidal basin C.

Then, after the expiration of one or two years, or when the new tidal prisms have done their work, we will know what excavation will be necessary to enable the largest ships to enter the new harbor, so as to "bring ship and car together."

We proceed to give an approximate estimate of cost for executing this work according to the designs shown in the drawing:

(Plaintiff's Exhibit No. 8—continued.)

1.—Number of cubic yards of stone in the training-walls	127,200	
Number of cubic yards of stone in the aprons, supposing them to be 20 feet square and 2 feet thick, and placed 100 feet apart between centers	6,650	
Total cubic yards of stone in training-walls	133,850	
Which, at $3 per yard, amounts to		$401,55[illegible]

In this estimate we have disregarded the void spaces between the stones, which will be a liberal allowance for the settlement of the stone in the sand, and for the stone that may be washed away by storms during the construction.

We allow two tons of two thousand (2,000) pounds each to the cubic yard.

We suppose the stone to be obtained at Yerba Buena Island.

Dredging.

To dredge a channel between training-walls 100 feet wide and to a depth of 6 feet below low-water, removing thereby the hard sand on the surface of the bar, 113,300 cubic yards, at 30 cents per cubic yard		33,990[illegible]
		435.54[illegible]
Add 10 per cent. for contingencies		43,55[illegible]
		479,09[illegible]

2.—Excavation of canal.

Number of cubic yards of excavation in the canal to give a depth of 8 feet of water at low-tide from San Antonio Estuary to San Leandro Bay 2,329,980, at 15 cents per cubic yard	$349,497[illegible]

We have put the estimate for the excavation of the canal at a low figure, because we suppose the excavated material can be used for filling up the marshes in the rear of the bulk-heads at Oakland and Alameda, and that whoever makes this excavation will also fill in these marshes.

The same remarks apply, though to a less extent, to our estimate for the dredging.

(Plaintiff's Exhibit No. 8—continued.)

3.—Dam

At the mouth of San Leandro Bay. Number of cubic yards of stone in the dam, 21,670, at $3 per cubic yard	65,010.00

4.—Tidal Basin C.

Number of cubic yards of excavation to give a depth of 2 feet below low-water, 3,198,100, at 25 cents per cubic yard	799,525.00
	1,214,032.00
Add 10 per cent. for contingencies	121,403.20
Total cost of Nos. 2, 3, and 4	1,335,435.20

At this point our estimate ends. We suppose, if the United States undertakes the improvement of San Antonio Estuary it will confine its efforts to making the harbor accessible for the usual sea-going vessels, and to securing the natural forces of conservation by providing the maximum available tidal areas.

This done, whatever shall remain in the way of providing conveniences and accommodations for commerce, may, we think, with propriety, be left to the commercial interests concerned.

Possibly some future work may be required to obtain the necessary depth of water between the two training-walls. This may be done at first, as we have stated above, by short wing-walls thrown out on either side of the channel, thereby confining the water-way to a width sufficient to maintain the requisite depth.

As commerce increases, the ends of these wing-walls can be taken up, and the width of the channel

(Plaintiff's Exhibit No. 8—continued.)

of approach increased from time to time, if necessary, by dredging.

Here we ought to state, that if our only object had been to provide a narrow and deep channel of entrance to San Antonio Estuary, we would have placed the training-walls only about 500 feet apart; but looking to the probable future wants of this harbor when its commerce may be large, we thought it best to provide a wider entrance.

When the work we have described is completed, Oakland and Alameda will have a fine land-locked harbor or basin at B, capable of accommodating forty large ships at the same time alongside their wharves, with room for as many more at anchor in the estuary, and have room besides for as many ferry-slips as would be wanted to accommodate travel.

Oakland is not a port of entry, the nearest port being San Francisco, distant about five miles. Oakland is so intimately connected with San Francisco that the interests of the two cities, if not identical, are as nearly allied as those of New York and Brooklyn.

We learn from the newspapers of the day that there were 67,000 overland passengers, 2,000,000 ferry passengers, $32,000,000 in treasure from the mines of California and Nevada; 450,000 tons of general freight; 161,000 tons of wheat, valued at $6,440,000, all passing over the long-wharf at Oakland during the past year.

(Plaintiff's Exhibit No. 8—continued.)

As both travel and trade between the two cities are increasing rapidly, and the present wharf is only a temporary one, it would seem that the interests of the two cities would be greatly increased by some more permanent landings at Oakland.

If such be the views of Congress, and if it be decided to improve the harbor of Oakland, we recommend the appropriation of the amount necessary to construct the two training-walls, and dredge out a channel between them 100 feet wide, having a depth of 6 feet at low-water, at the present session of Congress, viz, $479,094.

This amount would give a beneficial and useful result at once, and establish all the travel and much of the trade between the two cities on a better basis of communication than they now have.

We will close this report by stating that there are many details connected with this improvement into which we cannot enter without prolonging this paper to unreasonable length; such, for instance, as the objections which may be urged against closing up the natural entrance into San Leandro Bay, and to what extent these objections may be compensated by affording a deeper entrance to it through San Antonio estuary and the canal; such, also, as the objection to placing obstructions in the tidal prism of the Bay of San Francisco, and how far this objection may be compensated by increased tidal water in San Antonio estuary and the canal connecting it with San Leandro Bay.

(Plaintiff's Exhibit No. 8—continued.)

Again, there will be land-damages, and bridges will be required over the proposed canal.

Still, again, the two bridges across the harbor at Oakland will not be suitable structures when that harbor has an active commerce.

As the first work to be done will be to build the training-walls and dredge a channel between them, time will be afforded during the execution of this work to mature the details of all such special matters not herein discussed.

Respectfuly submitted,

G. H. MENDELL,
Major of Engineers.

C. SEAFORTH STEWART,
Lieut. Col. of Engineers.

B. S. ALEXANDER,
Lieut. Col. of Engineers.

Brig. Gen. A. A. HUMPHREYS,
Chief of Engineers, U. S. A.

[Endorsed]: Plaintiff's Ex. 8. Filed 3/21/40.

(Thereupon, an adjournment was taken until 2 o'clock p. m., this date.) [400]

Afternoon Session

The Court: You may proceed with the hearing. I presume, as far as either side, if any attorneys are absent, the others are prepared to go ahead.

Mr. Coakley: As I understand it now, Mr. Toole, the purpose of this proceeding now is simply with

reference to the establishment of harbor lines? It is limited to that?

Mr. Toole: It is generally limited to that. I don't want to put myself on record strictly about harbor lines. Bridges may come in.

Mr. Coakley: I understood today we would have testimony as to the establishment of harbor lines.

Mr. Toole: That is it, generally. I am not going to guarantee what might develop in the course of my examination.

The Court: You intend to put the whole subject matter before me. In other words, it is going to be complete; and any ruling I make will determine the entire issue, except, of course, if you take exception to my ruling.

Mr. Coakley: We have come to an agreement of facts stated in the big stipulation. There are two other matters,—the report and testimony of Major Mendell,—which we stipulated to subject to objections on both sides as to materiality. As I understood, the one thing in issue, the only thing we are going to have testimony on today, is the establishment of harbor lines; and that is all we are prepared to meet today.

Mr. Toole: That is generally true, your Honor. I may say, as a foundation for the evidence that the Government proposes to introduce, that in the resolution of December 6, 1909, the County offered to accept the bridges provided the United States would equip them with electrical operating machinery; and provided further that [401] the United States would

lease the waterfront on the Tidal Canal and establish harbor lines that are in the offer of the County. In the resolution accepting the license, the County recites that the waterfront was leased and that harbor lines were established. The witness we propose to call now will testify as to just those two things. That is true.

The Court: Is it the contention this is false; that they did not do that?

Mr. Toole: No, your Honor. That was done.

The Court: And the other side is denying it was done?

Mr. Toole: Yes, at least in the stipulation.

Mr. Coakley: Our position is whether or not harbor lines were established and whether or not any of the waterfront was ever thereafter leased by the Government is an incidental part of this whole proceeding; but there was some question about it and it was thought it would be better to present the evidence with reference thereto.

The Court: If the evidence given does not so establish it, I presume you feel that is to your advantage?

Mr. Coakley: We don't want to be in the position of emphasizing——

The Court: It is not a material issue?

Mr. Coakley: It is a rather insignificant part of our defense; but we want to take advantage of all the points that may be involved in the facts.

The Court: You do not mean it could not be determined, then?

Mr. Coakley: No.

Mr. Toole: I will call Mr. Pond.

HENRY S. POND,

called for the United States; sworn.

Direct Examination

Mr. Toole: Q. Your name is Henry Pond?

A. Yes, sir. [402]

Q. Where do you reside?

A. At 1064 San Antonio Avenue, Alameda.

Q. What is your occupation?

A. I am senior civil engineer in the United States Engineer's office.

Q. How long have you been connected with the United States Engineer's office?

A. Continuously since September, 1914, except for approximately two years at the war time, and approximately sixteen months in 1922 and 1923.

Q. When you speak of the United States Engineer's office, you mean the main office here in San Francisco?

A. I was in the Second San Francisco District, which is now the Sacramento District, one year, 1914—September, 1914, to 1915. All my other duty has been with what is now the San Francisco District.

Q. What are your present duties in the United States Engineer's office in San Francisco?

A. I am chief of the engineering division.

(Testimony of Henry S. Pond.)

Q. What documents or records, if any, are under your custody in that office?

A. The maps and all files directly in reference to the maps are in my custody.

Mr. Toole: Mark that for identification.

The Clerk: You will have to apply to the Court for exhibit numbers.

Mr. Toole: I want this marked for identification. I think it is No. 9.

The Court: We usually have them marked by letters for identification so as to distinguish those received in evidence from those that are not. The numbers are received; and the others are identified. I think this would better be marked Exhibit "A"—Government's Exhibit "A". What is it characterized as?

Mr. Toole: It is "Title Sheet." I have one for your Honor's convenience.

(Document marked—"Government's Exhibit A For Identification." [403]

Mr. Toole: Q. I hand you a document marked Government's Exhibit "A", and ask you whether or not that is a blueprint or copy of a document in your custody, in your official position.

A. This is a reduced copy of a title sheet of the harbor line maps for San Francisco Bay from my office.

Q. From your office? A. Yes.

Q. What is that document?

Mr. Coakley: Just a moment. That is objected to on the ground the document speaks for itself;

(Testimony of Henry S. Pond.)

that is the best evidence.

Mr. Toole: Q. Describe generally what it is. Can you do that? Without stating what is in this particular document, what do you call the document I have handed you?

A. Title sheet. It pertains to a series of sheets of maps, all of the same—all belonging together, bound together.

Q. Now, Captain Pond, in your experience as an engineer with the Government, have you ever done any work in the establishment of harbor lines?

A. Yes; my duties include harbor line work, which is done by our office.

Q. At the present time? A. Yes.

Q. What past experience have you had?

A. Those have been my duties since 1920 in part —I mean, in part my duties.

Q. What is a harbor line, Captain Pond?

A. A harbor line?

Mr. Coakley: Just a minute. May I object at this time on the ground it is incompetent, irrelevant and immaterial, calling for his conclusion as to a matter of law and calling for his conclusion on matters of fact, also.

Mr. Toole: I just asked the witness to define what a harbor line was.

The Court: He knows that is a matter of law as to what a harbor line is.

Mr. Toole: I withdraw that question; strike it out. [404]

(Testimony of Henry S. Pond.)

Q. What is a harbor line, as used in engineering parlance?

Mr. Coakley: The same objection: on the ground it calls for the opinion and conclusion of the witness as to matters of fact and law; incompetent, irrelevant and immaterial.

The Court: I don't know if a matter of law is involved. There must be a definition in connection with engineering which is a subject only, I presume, of going to the dictionary to find out what it means. I think he could, as an engineer, state what he understands is such. If that is the question, I will allow it.

The Witness: Do I answer?

The Court: Q. You are an expert engineer?

A. I presume I am.

Q. Don't you know?

A. In fact, I consider I am an expert engineer.

Q. Do you feel you are entitled to testify what that means? A. Yes.

Q. Answer that.

A. A harbor line is a reference line defining the distance out to which shore structures may be built over navigable waters of the United States.

Mr. Toole: Q. Will you describe the mechanics of establishing harbor lines?

A. Harbor lines normally can only be established in localities where there is apt to be sufficient port development so that it is desirable that they should be coordinated all along the general lines;

(Testimony of Henry S. Pond.)

so that it should normally be decided that harbor lines should be established in some localities and waters given for survey for that purpose; the survey is normally done by the district which has the waterway under jurisdiction. The surveys consist of the hydrography,—that is, the soundings; that is, survey of the shore frontage, with what we normally call three-degree action; that is fairly accurate. Then the surveys are platted, together with all of the shore development that is in existence at the time; and a tentative system of lines is laid out up to which piers may be constructed or solid fills made so as to base the coordinated [405] development of the area with the least infringement on the navigable waters. Those lines are then mapped out; the maps with them on are forwarded through the engineers in a report to the Chief of Engineers, who refers them to the Secretary of War; and if they are approved he so endorses on them, and they become the harbor lines as established.

Q. Are there any records in your office to show harbor lines were established in the Tidal Canal?

Mr. Coakley: Just a minute. I object to that on the ground it is incompetent, irrelevant and immaterial, calling for the conclusion of the witness as to matters of fact and law. The records themselves would be the best evidence.

Mr. Toole: I asked if there were such.

(Testimony of Henry S. Pond.)

Mr. Coakley: Let the record show my objection.

The Court: Do you still press your question?

Mr. Toole: No; I withdraw that question.

Q. Referring to Government's Exhibit "A"——

Mr. Toole: I offer that exhibit in evidence now, your Honor. That shows the establishment of harbor lines.

The Court: No objection?

Mr. Coakley: I have no objection to that sheet, your Honor.

The Court: That will be received as Government's Exhibit 9 in evidence.

(Document marked "Government's Exhibit No. 9.")

(Testimony of Henry S. Pond.)

Mr. Toole: Q. The endorsement on Exhibit 9 states in part as follows:

"The owners of property abutting the lands included in the right of way acquired by the United States for the Oakland Tidal Canal shown on accompanying Sheet No. 5 are hereby authorized—" et cetera. [406]

Have you in your custody either the sheet I have referred to in that endorsement or a copy of it?

A. No.

Q. Have you made a search? A. Yes.

Q. Calling your attention to a map on the board ——

Can your Honor see this? I imagine not.

The Court: It all depends. I can see where you are pointing to, showing certain streets; but I cannot see the canal limits. If you will, point to it. It looks like a section of the Bay or Estuary.

Mr. Toole: Here is the Bay. Here is the Tidal Canal; and here is the other.

The Court: I can follow to that extent.

Mr. Toole: Q. Inviting your attention to——

I think I would better have this marked. That would be Exhibit "B"?

The Court: You want to have marked Exhibit "B" for Identification the document on the board; the smaller white one will be marked "B" for Identification,—a map.

(Document marked "Government's Exhibit B For Identification.")

(Testimony of Henry S. Pond.)

Mr. Toole: Q. Inviting your attention to the map marked Government's Exhibit "B," I ask you whether it is a copy or blueprint of Sheet No. 5 which is referred to in Government's Exhibit 9,—title sheet you have in your hand.

Mr. Coakley: Is that a question?

The Court: Have you finished?

Mr. Toole: I said: referring to Government's Exhibit "B." I asked the witness whether or not it is a copy of the blueprint or Sheet No. 5 which is referred to in Government's Exhibit 9,—the title sheet.

The Witness: A. No.

Mr. Toole: Q. Wherein does it differ from original Sheet No. [407] 5 referred to in Government's Exhibit 9?

A. Certain corrections have been made——

Q. Do you want to point them out?

A. (Continuing) ——on a table of coordinates which gives the location of the canal points, harbor line points, points of harbor lines; corrections have been made to those coordinates for certain points, and in addition a front section of pierhead line has been added at the extreme upstream end of the Tidal Canal at San Leandro Bay.

Q. So far as Government's Exhibit "B" is concerned, does it show the same lines between the High Street and Park Street bridges as the original Sheet 5 which is referred to in Government's Exhibit 9? A. Yes.

(Testimony of Henry S. Pond.)

Q. How do you know that, Captain Pond?

A. There are two reasons: one reason is that I have found the correspondence drawing attention of the Chief of Engineers to these corrections, and forwarding them, saying that the error had been discovered in original Sheet 5, and sending forward a corrected sheet with these on; and in return the approval of the Chief of Engineers bearing this number on this; it is in the reverse: 36925

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Q. Does Government's Exhibit "B" show harbor lines between Park and High Street Bridges?

Mr. Coakley: That is objected to on the ground that it is incompetent, irrelevant and immaterial, and not within the issues of this case, and it is not involved in the alleged license agreement of 1910 setting forth the conditions under which the County assumed the control and operation of the bridges; that the establishment of harbor lines was not the consideration for the assumption of control by the County because of the fact that the Government in establishing harbor lines was doing only what it was already bound to do and for the benefit of commerce and protection of Government property along there; and that the alleged agreement [408] between the County and the Government was illegal and beyond the scope of the authority of the Board of Supervisors of Alameda County; and that, further, that reference to whether or not this

(Testimony of Henry S. Pond.)

map shows harbor lines between what was the point of Park and High Street bridges is asking the witness to testify to the contents of a document. I submit the document speaks for itself. On those grounds, I submit the objection.

Mr. Toole: I would like to change the form of my question, then, your Honor. However, before I do so, in answering counsel's objection, I invite the Court's attention to the fact, as I did before, that the 1909 resolution of the County recites that no harbor lines were established, and if they were it would be one of the considerations given by the Government for the County to take over the bridges; and the resolution of 1910 recites that harbor lines have been established. You can strike that.

Mr. Coakley: We differ from counsel as to these things he has mentioned.

Mr. Toole: You don't differ from me that the resolutions make those recitations?

The Court: You specified the harbor lines as 1909 establishes——

Mr. Toole: I invite your Honor to page 99 of the stipulation of facts—I beg pardon; I said the resolution of 1910; I meant the resolution of 1913. It was a license in 1910. Now, the first paragraph of that resolution says that:

"Whereas, this Board of Supervisors, by resolution heretofore adopted, agreed to accept certain draw bridges across the United States Tidal Canal in Alameda County, commonly known as the Park

(Testimony of Henry S. Pond.)

Street Bridge, Fruitvale Avenue Bridge and High Street Bridge, and assume all costs of future repair, operating and replacement of said bridges, provided that each of said bridges were placed in such condition and repair by the United States Government that said [409] bridges, and each of them, might be operated by electricity, and that the United States should, under such terms and conditions as it might see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks; and——"

That was in the County's own resolution. There was a similar recitation in the first. Now, for the question:

Q. Do the words "harbor lines" appear in Government's Exhibit "B" any place?

A. Yes. The title of this sheet is "Harbor Lines Survey, San Francisco Bay, 1910."

Q. That is on the title. Outside of the title, does it appear?

A. That is the endorsement. No; that is not the title. It is an endorsement: "The corrections in coordinates of points numbers 76, 77, 78, 79 and 81 in both pierhead and bulkhead lines, and the addition of pierhead line between points numbers 79 and 81 shown thus——" shown as a broken line—"and also U. S. Ed. Mon. No. 29 with reference to point number 81 are hereby approved."

Q. What is an engineer's definition for "pierhead line"?

(Testimony of Henry S. Pond.)

A. A line as to which pier constructions may be constructed without further consent from the Secretary of War.

Q. What is an engineer's definition of "bulkhead line"?

A. Bulkhead line is a line to which solid fills may be made over navigable waters of the United States without further consent of the Secretary of War—further approval.

Q. Are there any lines on Government's Exhibit No. 2 which are designated in writing as "pierhead" or "bulkhead line"?

Mr. Coakley: The same objection I made before; I object to this question on all grounds heretofore mentioned.

Mr. Toole: Strike the question. I would like to have them marked for identification "C."

The Court: It may be marked "C" For Identification.

(Document marked "Government's Exhibit C For Identification.") [410]

Mr. Toole: Q. Captain Pond, you have in your hand Government's Exhibit "C." Was that exhibit prepared under your supervision and direction?

A. It was.

Mr. Toole: I think counsel will agree that the principal outlines of Government's Exhibit "C" were the same data as the map that has been stipulated as Exhibit 2?

(Testimony of Henry S. Pond.)

Mr. Coakley: I suggest that you ask Captain Pond about that, Mr. Toole; and I think, if it will expedite matters, I would be glad to enter into a stipulation with you that all this line of testimony as to the establishment of harbor lines is being objected to on the ground that it is incompetent, irrelevant and immaterial and these other grounds which I mentioned heretofore in the last objection that I made.

Mr. Toole: Yes.

Mr. Coakley: If you want to stipulate to all this line of testimony of this witness that it is deemed objected to on those grounds?

Mr. Toole: Yes; I will be glad to make that stipulation.

Mr. Coakley: So I won't have to keep repeating it. I'd be glad to refrain from making objections.

Mr. Toole: I am willing to make that stipulation.

The Court: Proceed. If you have any special objections, you may make them.

Mr. Toole: Q. Captain Pond, were the principal outlines on Government's Exhibit "C" prepared from the same data as the map designated Exhibit 2 in the stipulation—Exhibit 2 is the first map?

A. The outline of the Tidal Canal itself was prepared from the same map; but—This is Exhibit "C"?

Q. Yes.

A. —was brought up to date as to its date for streets collateral and the harbor line put on it.

(Testimony of Henry S. Pond.)

Q. Now, Exhibit "C" shows what purport to be bulkhead and pierhead [411] lines between Park and High Streets. From what data were those lines taken on Exhibit "C"?

A. Those data were taken from harbor line Sheet 5,—corrected harbor line Sheet 5, which we previously discussed. To that exhibit, I would like to state that the note on Exhibit "C" is in error —No; it is not in error. That is correct. I understood, at first glance at it, to say it had been taken from that—That is correct.

Q. That is correct? A. Yes.

Mr. Toole: I offer Government's Exhibit "C" in evidence.

Mr. Coakley: To which I object on the ground—on the grounds heretofore, to-wit: Incompetent, irrelevant and immaterial; that this document in particular is not the best evidence; it is not an original record, but it seems to have been made up from other maps or records; it is not even a copy of any particular record,—sort of a composite of a number of records,—and therefore it is not admissible because it is not an official document, not a copy of an official document on file any place; incompetent, irrelevant and immaterial to any issues in this case.

Mr. Toole: Q. Is that a copy from documents which are in your custody and control,—maps?

A. Yes, sir.

Mr. Toole: I may say I am taken somewhat by surprise by that part of your objection, because, as I understood, no technical objections would be made as to the type of evidence.

(Testimony of Henry S. Pond.)

Mr. Coakley: No technical objection to be made to this, assuming that the foundation is laid for the admission of this Sheet 5; but, of course, my general objections which I have heretofore stated I am not relinquishing; but, as to Exhibit "C", here, which is something different from Sheet 5, it includes some of the things in Sheet 5; it also has other things not in Sheet 5; seems to have been made up recently from Sheet 5 and other documents; and I do not know the principle of law upon which such document [412] is admissible.

Mr. Toole: The witness has testified that the principal lines showing the Tidal Canal were taken from the same data of which Exhibit 2 in the stipulation was prepared from, and which both parties have agreed are the outlines of the Tidal Canal.

The Court: I see.

Mr. Toole: The witness has testified that the further data on Government's Exhibit "C" were taken from Sheet 5 to which he testified.

Mr. Coakley: Just a moment. That is exactly correct as to harbor lines; but this map also shows street lines which are not either on the harbor line map or Sheet 5.

Mr. Toole: I think street lines are immaterial.

Mr. Coakley: There are other things such as crayon marks, legends, which do not appear on Sheet 5.

Mr. Toole: They are different colors; that is about the only difference. Counsel complains that

(Testimony of Henry S. Pond.)

the pink color on the map——

Mr. Coakley: That is not all.

Mr. Toole: That is between bulkhead and pierhead line.

The Witness: Yes.

Mr. Coakley: But it has a legend number; that is certainly a statement of fact which is not a part of this Sheet 5 which I understand is a copy of some other documents. Now, as I said before, if the proper foundation for the admission of Sheet 5, which is Exhibit "B" For Identification, is laid, of course, subject to objection as to materiality, it may be admissible; but this other, Exhibit "C," which is not a copy of this Sheet 5, is not admissible, because it is not a duplicate of any original document which is on file any place.

Mr. Toole: Q. Captain Pond, this Government's Exhibit "C" correctly shows the bulkhead and pierhead lines as approved by the [413] Secretary of War on June 3, 1913? A. Yes.

Mr. Coakley: That is objected to on the grounds that it is incompetent, irrelevant and immaterial, and that it is calling for the witness's conclusion as to what the document shows. The document is the best evidence.

Mr. Toole: I just offered it in evidence.

The Court: I will overrule the objection and receive it as Government's Exhibit No. 10.

(Document marked "Government's Exhibit No. 10.")

(Testimony of Henry S. Pond.)

Mr. Toole: Q. Now, have you searched the records of your office to ascertain whether or not harbor lines between Park Street and High Street bridges were esablished prior to 1913—Subject to the same objection.

A. Yes, I have personally searched them and caused them to be searched by others.

Q. What is the result of that search?

A. We found nothing.

Mr. Coakley: I have special objections to make to that. I object to the question on the ground that it calls for hearsay, to-wit: the witness's version of what the records show; that the records themselves would be the best evidence.

The Court: Sometimes, of course, the records are large. Are there true copies of the records?

The Witness: This is a compilation from various official maps in our office, carefully made.

The Court: Q. In other words, can you distinguish from which maps you received this data?

Mr. Toole: I believe it says, somewhere in the legend. I might say, your Honor, that the Exhibit 2 attached to the stipulation was agreed to by both of us as being correct.

The Court: What do you mean by "Exhibit 2"?

Mr. Toole: Exhibit 2 of the stipulation.

The Court: What is this compared to Exhibit 2? [414]

Mr. Toole: That shows pierhead and bulkhead lines as existing in 1913. Those lines are not on Exhibit 2.

(Testimony of Henry S. Pond.)

The Court: He has gotten this information from some source, not any source that has been stipulated; it has not been received as yet, but he got it from searching records; he got this data from those?

Mr. Toole: That is right.

The Court: Q. And they are on file in your department? A. Yes.

Q. Are you in a position to say from what records you got them—at any rate, you got them from——

A. I cannot say from what particular record each individual item on this map is taken. I can say each particular item on this map is from official records in our office.

Q. And does not vary from them in any way whatsoever? Still, is there any record that is inconsistent in regard to these things?

A. No, sir. Inconsistent, you say?

Q. Yes. In other words, do these things show on all the records? A. Yes, sir.

Q. Wherever they appear?

A. Yes, they are all here on all the records in the office, consistently.

Q. Without any change over the period of years?

A. Oh, no, sir. We have wharves on here which have changed.

Q. Do you know from where those came? The only thing I can say is it is difficult on cross-examination to show whether this is accurate or not.

(Testimony of Henry S. Pond.)

Mr. Toole: My question did not have anything to do with this exhibit at all.

The Court: Will the reporter read the record? (Record read)

Q. When searching all those, did you check this?

A. That is why I said I personally searched them. I was not quite satisfied with the search of others, so I consequently searched them all personally,—the filed records. [415]

The Court: I will allow the question.

Mr. Toole: Q. What was the result of that search?

Mr. Coakley: Objected to on the ground it is not the best evidence, and calls for the conclusion of the witness, and is incompetent, irrelevant and immaterial.

The Court: I think an expert can take accounts from records where they are voluminous like this—

Q. And they are quite voluminous, aren't they?

A. Yes, sir.

The Court: I think the only way we can do is to have—One of the ways that it could be permitted is to have an expert, like the one who is testifying that says he is an expert and qualifies, prepare such a matter as this, because it would be almost impractical to bring the witness.

Mr. Toole: The witness has produced the only record that he found.

(Testimony of Henry S. Pond.)

The Court: I will allow the question. Proceed.

The Witness: A. There was no record that I could find in our office showing the establishment of harbor lines between Park Street bridge and High Street bridge prior to these lines in 1912, established in 1912.

The Court: Q. As a result of your search?

A. Yes, sir.

Mr. Toole: Q. And approved by the Secretary of War?

A. The Secretary of War, in 1913.

Q. Have you searched the records in your office to ascertain whether any report was made prior to 1913 as to the establishment of harbor lines in the Tidal Canal? A. Yes.

Q. Have you that report?

A. Yes; I have a printed copy.

Q. Will you produce it, please?

A. That '94 report.

Q. Is that document you have in your hand an official record of the Government, particularly of the Engineer's office in San Francisco?

A. This is the annual report, Chief of Engineers, [416] United States Army, Part 1, 1894.

Q. Now, in reference to the establishment of harbor lines in the Tidal Canal prior to 1913, will you turn to the statement in that report that you referred to and read it, please?

Mr. Coakley: Could I see it?

Mr. Toole: I thought we showed you that before.

(Testimony of Henry S. Pond.)

Mr. Coakley: Q. This here is what you have reference to? A. Yes.

Q. Anything goes with this?

A. Yes; this endorsement on this map—endorsement data—the same.

Mr. Toole: I take it all this testimony, Mr. Coakley, is subject to your objection?

Mr. Coakley: Yes.

The Witness: A. On page 2506 of the report, under the heading, "Establishment of Harbor Line in Oakland Harbor, California," it reads:

"United States Engineer Office, San Francisco, Cal., September 20, 1893; General:

"I have the honor to forward, in a separate roll, a tracing exhibiting the harbor lines of Oakland Estuary, recommended by the Board of Engineer Officers constituted by Special Orders No. 51 Headquarters, Corps of Engineers, October 11, 1888, at a session held on the 18th instant. The description of the lines may be found on the tracing by references to established streets in the City of Oakland. Very respectfully, your obedient servant, G. H. Mendell, Colonel, Corps of Engineers.

"To Brig. Gen. Thomas L. Casey, Chief of Engineers, U. S. A."

Then in brackets, "First Endorsement." Then it reads:

"Office Chief of Engineers, U. S. Army, September 27, 1893. Respectfully submitted to the Secretary of War without recommendation that the

(Testimony of Henry S. Pond.)

harbor lines proposed by the Board of Engineers and shown in the accompanying tracing be approved. [417]

"It is further recommended that the approval be placed both on this paper and the tracing submitted.

"Thomas Lincoln Casey, Brig. Gen., Chief of Engineers.

"War Department, September 29, 1893. Approved Daniel S. Lamont, Secretary of War."

Q. That report refers to a map, Captain Pond. Have you that map with you? A. A copy.

Mr. Coakley: Can we have that—what he read from—identified by some number?

The Court: Q. What was this read from?

A. I just designated it in the record.

The volume it is from is an exhibit for identification?

Mr. O'Toole: I have no objection. We can photostat that page if you want it.

The Court: If he wants to have it photostated and substitute the page, what page? 2506?

The Witness: 2506; I read it in the record.

The Court: Q. What is the name of the document?

A. Annual report of the Chief of Engineers, United States Army, 1894, part IV. I think I read it as part I before, and that was in error.

The Court: That will be received as Exhibit "D."

(Testimony of Henry S. Pond.)

The Witness: May I digress a moment? So far as my own office is concerned, we would like to substitute for this a photostat.

The Court: That is agreeable.

Mr. Toole: That is Government's Exhibit "D"?

The Court: Government's Exhibit "D" For Identification, which is merely that one page, 2506.

Mr. Toole: That would not be Government's exhibit; it is read in the record, as far as the Government is concerned, and I am satisfied.

The Court: I do not see any harm. He asked for it. It is [418] done at his request. I can make it his exhibit.

Mr. Toole: I have no objection to it going in as Government's Exhibit "D."

(Document marked "Government's Exhibit D For Identification.")

Mr. Toole: Q. That report refers to a map. Have you that map or a copy of it with you?

A. The upper map on the board is a copy of the map.

Q. Now, Captain Pond, as an engineer, this map has certain dotted lines——

The Court: This is a new map you are showing?

Mr. Toole: Mark this Government's exhibit.

The Court: "E" For Identification.

(Document marked "Government's Exhibit E For Identification.")

Mr. Toole: Q. This map, Government's Exhibit "E," has dotted lines running from a point close to

(Testimony of Henry S. Pond.)

the right edge down to various streets and to points in the Tidal Canal. Will you explain what those lines are?

A. Well, the report says that the lines are referred to the streets in all this portion to which I am pointing: Dennison Street, Frederick Street, Shasta Avenue and Canal Street. Angle points on the pierhead and bulkhead line are on a line of that street extended and are definite distances from some street intersection, all shown on the map; but when we get east of Canal Street the harbor line has a curve, and thereafter it has reference to the center and radii; the center and those broken lines which you spoke of are the radii of that curve; the center of the curve would be ascertained from the——

Q. What was the purpose of putting those lines in there?

A. To define where the lines are.

Q. What was the purpose of putting these broken lines,—these radii,—on the map? Do they refer to bulkhead or pierhead lines?

A. They refer to pierhead line; and define its position. [419]

Q. Do they show where that pierhead line stops or starts?

A. Yes. The lines of reference stop at a point marked 741.20 feet west of Park Street.

Q. So that the broken line with the mark on it, R-1029.68, has reference to where the bulkhead lines stop?

(Testimony of Henry S. Pond.)

A. No; the bulkhead line stops farther west. The pierhead lines stop——

Q. The pierhead lines stop, and the bulkhead farther west?

A. So it would be interpreted by my office.

The Court: Q. It was interpreted that way by you, also? A. Yes, sir.

Mr. Toole: I offer Government's Exhibit "D" in evidence and ask leave to withdraw it and have photostats or blueprints made for the convenience of Court and counsel.

The Court: I thought you meant this big map?

Mr. Coakley: Subject to the same objection.

The Court: No. 11 in evidence.

(Document marked "Government's Exhibit No. 11.")

(Testimony of Henry S. Pond.)

The Witness: I think I can furnish as many copies of that, full size, as you desire. I am not certain.

Mr. Toole: I will also offer Government's Exhibit "B" as an exhibit in evidence, with the same request.

Mr. Coakley: Subject to the same objection.

The Court: Well, it will be received as Exhibit 12 in evidence,—your exhibit.

(Document marked "Government's Exhibit No. 12.")

(Testimony of Henry S. Pond.)

Mr. Toole: Is this big map,—the large one,—Government's Exhibit 12 or 11?

The Court: The blue one is No. 11.

Mr. Coakley: And the lower one is 12.

Mr. Toole: Q. Is Exhibit 11 the only record you have in your office showing the establishment of harbor lines in the Canal prior [420] to 1913?

A. Yes, the only map record. We have this report.

Mr. Coakley: May I hear that again?

(Record read)

Mr. Toole: And the report refers to——

Mr. Coakley: I object to that question on the same ground, also on the ground it is calling for his conclusion as to what the records of his office show or do not show.

Mr. Toole: The witness testified he had searched his records.

The Court: Q. You have gone over those records? A. Very carefully, in detail.

The Court: I will overrule the objection.

Mr. Toole: Q. When you said, "this report," in answer to my last question, you were referring to Government's Exhibit 11?

A. The report I have just read.

Q. Prior to the establishment of harbor lines between High and Park Street bridges, in 1913, was the Government property between those bridges available for lease?

(Testimony of Henry S. Pond.)

A. I found many instances in the record—several instances where a lease was refused to private property owners; I found an instance where there was an indication that a request of the City of Alameda for the use of frontage on a city street would receive favorable consideration.

Q. What was the situation in regard to the leasing of the Government property between High Street and Park Street bridges after the establishment of harbor lines in 1913?

A. The abutting owners were permitted to use the Government property between the bulkhead and pierhead lines fronting on their private property without lease or without rental, without formality of any kind.

Mr. Toole: Now, referring to Government's Exhibit 10—Is that right, your Honor?

The Court: Yes, that is right. [421]

Mr. Toole: Q. Let me ask you whether it shows anything in regard to the advantage taken by people of that privilege of leasing or building on the Government property after 1913.

A. The dark shaded strips along the Tidal Canal are wharves that were built under that privilege.

Mr. Coakley: Now, this is an addition to the objection I have already made: I obejct to that statement on the ground it is the conclusion of the witness that this development was all the result of something that he testified to.

(Testimony of Henry S. Pond.)

The Court: Q. In other words, that is what the records reflect that you have seen?

A. I think so. What I intended to testify to is: these have been built by the abutting owners and have been used by them free of charge since that license—that free privilege—was granted. Is that what you intended to bring out?

Mr. Toole: Q. Yes.

The Court: Let us proceed.

Mr. Toole: Q. Captain Pond, Government's Exhibit 10 shows——

A. No; but they are reference pierhead lines.

Q. On Government's Exhibit 10, that line, pierhead, is shown by broken lines?

A. Dash and dot.

Q. And the bulkhead line is shown by broken lines. Now, as an engineer, what is the definition of the situation when the bulkhead and pierhead lines are established? Is that the establishment of harbor lines?

A. Oh, yes. Bulkhead and pier lines together make the harbor system.

Q. Harbor lines? A. Yes.

Q. And on Government's Exhibit 10, marked in pink between the bulkhead and pierhead lines, what is that strip of land?

A. Those are the strips of land owned by the Government which the abutting owners were permitted to use free of charge. [422]

Q. Now, saying that that is the land which was

(Testimony of Henry S. Pond.)

made available to property owners free of charge, is that the property just referred to in the endorsement on Government's Exhibit 9?

A. In the endorsement dated June 3, 1913?

Q. Yes. A. Yes.

Q. Are the harbor lines shown on Government's Exhibit 10 the harbor lines referred to in Government's Exhibit 9?

Mr. Coakley: Just a minute. What is that Exhibit 10?

The Court: That is this one.

Mr. Coakley: The question is here—Let us have that question again.

(Question read)

The Court: How can that be "title sheet"? The same as it appears in the title sheet?

Mr. Toole: I will strike that question. They are all on this and this has been offered in evidence.

Q. Now, the endorsement on Government's Exhibit 9, dated January 20, 1913, referring to the establishment of harbor lines, is that the endorsement that has some reference to the same harbor lines in the Tidal Canal you have testified to, between High Street and Park Street bridges?

A. Yes. The endorsement of January 20, 1913, is the one which established the harbor lines.

Mr. Toole: That is all, your Honor. The Government rests, your Honor.

Mr. Coakley: Now, so that our record will be protected, I move to strike all the testimony on the

(Testimony of Henry S. Pond.)

grounds it is incompetent, irrelevant and immaterial, that it does not involve any of the issues in this case; that it was not a part of any consideration for the assumption of control by the County of Alameda of the bridges, or part of any consideration for any alleged agreement between the County and the United States government; and that any [423] such agreement between the Government and the County was and would be illegal, because it is beyond the powers of the Board of Supervisors and contrary to the Constitution of the State of California, in that any such agreement would constitute a gift of public funds to private corporations, the expenditure of public funds, in excess of the income provided for in any one year.

Now, with reference to the cross-examination of this witness, first, does your Honor want to rule on that motion to strike?

The Court: Is that one of the issues you have here that the whole case is resting on?

Mr. Coakley: This question of harbor lines is related to the issues defined by our stipulation of facts; but I submit, if this testimony that refers to harbor lines is immaterial——

The Court: Would you like to submit that without anything further?

Mr. Coakley: I will submit it.

Mr. Toole: The Government is willing to submit it, your Honor.

The Court: The objection will be overruled.

(Testimony of Henry S. Pond.)

Cross Examination

Mr. Coakley: Q. Now, Captain Pond, the harbor lines were established by virtue of what authority?

A. Section 9 of the River and Harbor Act of March 3, 1899.

Q. That is, United States statute, Act of Congress? A. Yes.

Q. And under that statute, the establishment of harbor lines is something which is in the discretion of the Secretary of War; isn't that right?

Mr. Toole: That is asking for a legal conclusion of this witness. Section 404 of the United States Code defines what the discretion of the Secretary of War is to establish harbor lines.

The Court: I presume that is calling for his conclusion. I will sustain the objection. [424]

Mr. Coakley: Q. Now, then, the harbor lines which you have testified to, and the pierhead and bulkhead lines to which you have testified, were established pursuant to the authority granted to the Secretary of War under that statute which you have just mentioned; is that right? A. Yes.

Q. And the harbor lines to which you testified on direct examination today were at the time they were established revocable at the will of the Secretary of War, were they not?

Mr. Toole: That is objected to unless the record shows that.

(Testimony of Henry S. Pond.)

Mr. Coakley: You put the witness on as an expert to question him as to the mechanics of the establishment of harbor lines.

Mr. Toole: To the mechanics.

Mr. Coakley: Generally and specifically, yes.

The Court: You put him on to show that he had the right to do certain things. It is more what things were done and in pursuance of certain other acts.

Mr. Toole: It calls for the legal conclusion of this witness.

The Court: I will sustain the objection.

Mr. Coakley: Q. The harbor lines or pierhead and bukhead lines to which you testified specifically this afternoon were changed from time to time, weren't they?

A. They have been changed since establishment, from time to time, yes.

Q. Changed by whom?

A. By the Secretary of War.

Q. Do you know when they were changed?

A. No; I have no—I cannot recite any changes except the one on that map; but there are such.

Q. So there won't be any question about it, the harbor lines to which I am referring in this question, the harbor lines to which you testified as having been established through the Tidal Canal, those harbor lines have been changed from time to time?

A. They have been changed once, I think. [425]

Q. And between 1913 and the present time?

A. Yes.

(Testimony of Henry S. Pond.)

Q. Changed by whom?

A. The Secretary of War.

Q. That is the power which he has to change the pierhead and bulkhead lines?

Mr. Toole: I object to that for the same reason; it calls for his conclusion.

The Court: I sustain the objection.

Mr. Coakley: Q. Now, then, with reference to the establishing of the harbor lines along and through the Tidal Canal, do you know who established those lines,—the person who established those lines? A. Do I personally know the person?

Q. Yes.

Mr. Toole: By "establishing," do you mean "surveyed it," or "approved it," or "submitted it," to the Secretary of War? All those things are done in establishing harbor lines.

Mr. Coakley: I want to know in detail just exactly what happened then in reference to establishing harbor lines to which he just testified; how they were established, and by whom; and what was done in establishing the line.

The Witness: You want me to recite events leading up to their approval?

Mr. Coakley: Q. Yes.

A. It was not done by my office, it was done by what is now the Sacramento District; so that I am not personally conversant with it except by looking over the records. My office now has the field notes and the original sheets; and we have certain of the

(Testimony of Henry S. Pond.)

correspondence regarding it; and with that backing I could tell you what the record is, as I best know it.

Q. When were those field notes made?

A. 1910, and 1911—I think, one in 1910 and 1911. There may be some in 1912.

Q. Do you know when, in 1910 and 1911?

A. No.

Q. When you say, "field notes," you mean notes made by a surveyor? [426]

A. Surveyors in the field.

Q. And some time before the making of those field notes, was there any direction from anyone to the surveyor who made those notes and made that survey?

A. Yes; there was a request to the Chief of Engineers for funds to make the survey in order to establish the harbor lines.

Q. When was that done?

A. That, I cannot tell; I do not know the exact date; but it was, of course, prior to the survey.

Q. How long prior?

A. I think that was made in 1909 or 1910; but I won't say which. I have seen a copy of the letter; but I won't say the date.

Q. In these records you say you searched in compiling the data upon which you base your testimony here today, did you have any record or letter showing who directed the person to make this survey and when it happened?

(Testimony of Henry S. Pond.)

A. We have not the original harbor lines board survey; I mean notes. The harbor lines established here were by a board of officers established for the purpose, constituted for the purpose of establishing these harbor lines in San Francisco Bay. We have not those original records of that board.

Q. Where are those original records?

A. We would like to know that. As I told you before, the work was done by the Sacramento District; the Sacramento District transferred to us the maps and the field notes. We are unable to find the field file record, though they told us they have transferred them to us, to our office; we cannot find them any place, and have diligently searched for them.

Q. Were those records to which you have just testified destroyed in the fire of 1906?

A. No. Those are records of 1910, 1911 and 1912.

[427]

Q. Do I understand that these records with reference to the survey and the establishment of pierhead and bulkhead lines, harbor lines, which you have been testifying to today, were made out of the Sacramento District office?

A. Surveys made out of the Sacramento District office, which was then the Second San Francisco District and had its headquarters here in San Francisco.

Q. Those original records you have been unable to find?

(Testimony of Henry S. Pond.)

A. We have been unable to find; and they are unable to find; because we have in our records an estimate of funds necessary to make this survey, as I remember it. I would have to check my memory on that.

Q. Your testimony here is based now upon original records of the survey which would result in the establishment of harbor lines in the Tidal Canal, and field notes, or upon records made from those original records? A. We have the field notes.

Q. Excepting the field notes,—outside of your field notes,—the testimony you have given today was made on the basis of records which were made subsequent?

A. The testimony I have made today as to the harbor lines in the Tidal Canal are based, imposed, on the title sheet we have in our office, so far as establishing these particular records in the Tidal Canal, except a matter of correction of those coordinated, which is in our records.

Q. You said something about the direction for the making of the survey and the establishing of harbor lines having taken place in 1909 or 1910. What records did you see in your office, if any, which purport to show such a direction?

A. I saw a request for the funds and a letter regarding the allotment of the funds. The date of either of those letters I do not remember; and I think I said I did not remember when the directions [428] for establishing of those harbor lines came, because I have never seen that particular letter.

(Testimony of Henry S. Pond.)

Mr. Toole: I might state it seems to me counsel is cross-examining on somewhat of a collateral question raised by himself because this witness's testimony as to the establishment of harbor lines was limited to three documents,—a title sheet and these two maps, Government's Exhibits 11 and 12,—and to the report which he read in evidence.

The Court: It was limited to all he could find.

Mr. Coakley: In addition to all the records of the office which he said he searched and examined, as I understand.

The Court: He made that general statement.

The Witness: May I speak up on that matter? I told you I searched the records, yes, as to whether there were any further harbor lines established in that period between that. There is a great deal of correspondence regarding harbor lines. What I searched for particularly was something that would indicate that harbor lines had been established or moved between 1893 and 1913. It is manifestly impossible for me to carry a clear recollection of the dates and contents of every letter I looked at.

The Court: Q. You did not find anything?

A. I did not find anything. I don't claim to be able to testify as to the exact date of every letter I would glance over quickly.

Mr. Toole: I might say we have a good many of these records here, and counsel has spent some two days going over them. If he wants to cross-examine the witness about some particular record, there will be no objection to it.

(Testimony of Henry S. Pond.)

The Court: Let us proceed.

Mr. Coakley: Q. The establishment of harbor lines, laying out of pierhead and bulkhead lines, on this Sheet 5,—did that take place all at the same time; or did the survey take place some time before the laying down of pierhead and bulkhead lines?

[429]

A. The records of our office show that the harbor lines in the Tidal Canal—those harbor lines upstream from Park Street——

Q. Through to San Leandro Bay?

A. Yes—were established from the survey made in connection with the condemnation of the land,—the description,—that there was no special survey made in 1910 and 1911 in that particularity.

Q. So I can clear that up: A survey was made in 1876 or thereabouts, when the condemnation proceedings in United States versus Crooks case took place; is that right?

A. That is my understanding.

Q. And the harbor lines which were established in 1913 were predicated and based upon that survey made in 1870 some time?

A. The harbor lines of 1913 in the Bay, in general, were established on a new survey; but the new survey was not extended through the Tidal Canal.

Q. In other words, the establishment of harbor lines which was made in 1913 was for the entire San Francisco Bay area; is that correct?

(Testimony of Henry S. Pond.)

A. The San Francisco frontage as far south as San Mateo County line; and the Eastbay frontage between Point San Pablo and a point south of Alameda, which I think is shown on that sheet.

Q. And that survey which you have just mentioned was made when? A. 1910 and 1911.

Q. And in the making of that survey, they did not make a survey of the Tidal Canal but used the survey which had been made back in 1870 some time? A. Yes.

Q. And in addition to the lines in the Tidal Canal, they simply layed down on the map pierheads and bulkheads with reference to the survey made in 1870 sometime?

A. With reference to the Government property line.

Q. Is that right?

A. Yes, if I understand your question. [430]

Q. Do you know who it was who drew the lines on this? A. No.

Q. On the original of which this Exhibit 11 is a copy? A. No.

Q. With reference to the laying down of the pierhead and bulkhead lines through the Tidal Canal as of 1910, 1911 and 1913, whatever year that was, was there any hearing of any kind held?

Mr. Toole: So far as records?

The Witness: A. So far as any records I have seen, as printed, there is no record of the hearing.

(Testimony of Henry S. Pond.)

Mr. Coakley: Q. Now, in the establishment of harbor lines, Captain, is it not the practice to have a hearing of some kind so that property owners along the shores where the harbor lines are to be established may have an opportunity to be heard?

A. Yes; but, as I explained before, records of the San Francisco Harbor Lines Board, which would probably be the board that would hold that hearing, is a thing we cannot find.

Q. So far as your records are concerned, you have found nothing to indicate there was any hearing?

A. I did not search particularly from that point of view; and we may find it, if we did so search. What I did search did not reveal any hearing.

Q. So, the establishment of harbor lines through the Canal in this particular instance was accomplished by some member of the United States Army Engineer's office drawing pierhead and bulkhead lines on the map, together with the approval on the map by the Secretary of War; is that right?

A. Well, no—together with the recommendations of the Harbor Line Board as to those particular lines, recommendation from the Chief of Engineers and the Secretary of War, and finally the approval of the Secretary of War.

Q. And in reference to the recommendation of those two Boards, was there any hearing in connection with their recommendations?

(Testimony of Henry S. Pond.)

A. That is a matter of record of the Harbor Lines Board which we [431] cannot find.

The Court: We will take a five-minute recess at this time.

(After Recess)

Mr. Coakley: Q. Now, then, with reference to these harbor lines in and through the Canal, when the harbor lines were changed after 1913 by the Secretary of War, was there any hearing of any kind at the time they were changed?

A. Yes; a public hearing.

Q. With reference to the harbor lines established in the Canal which you say occurred in 1913, do you know exactly when in 1913 it occurred?

A. That is endorsed on the title sheet.

Q. Do you know what appropriation the establishment of those harbor lines was made from?

A. Harbor lines work comes under the heading of examinations, surveys, contingencies, general, which cover harbor lines, anchorages, War Department permits, smaller miscellaneous things which do not pertain to one particular authorized appropriation, but there is not always a separate appropriation.

Q. When was that made?

A. I say there is not a separate appropriation. Those allotments are made out of annual appropriations for river and harbor construction.

Q. Do you know what particular annual appropriation this was made out of?

(Testimony of Henry S. Pond.)

A. No; they are made, normally, annually.

Q. Now, with reference to the leases which you testified to on direct examination, when did the Government first lease any property along the waterfront on the Tidal Canal?

A. Prior to our records which were burned in 1906.

Q. Prior to 1906?

A. Apparently; because our records describe lines then in existence.

Q. Prior to 1906, was the Government leasing—Do you know how [432] long prior to 1906?

A. No; I do not.

Mr. Toole: May I ask, your Honor, that this line of questioning be confined to that portion of the Tidal Canal between High Street and Park Street?

The Court: I think your examination was limited to that area.

Mr. Toole: Yes.

Mr. Coakley: I think his examination was in reference to the entire Tidal Canal.

The Court: I recall him making questions in that form, saying: "What transpired between those two bridges?" If something else crept in, I do not recall. I think he limited it between the two outer bridges,—the portion lying between the two.

Mr. Coakley: Q. Now, Captain, the Tidal Canal which you have been testifying to is not limited to the two bridges? A. No.

The Court: Q. Between the two bridges?

(Testimony of Henry S. Pond.)

A. No, sir; it was not.

Mr. Coakley: Q. And the testimony which you gave this afternoon, when you talked about tidal canals, harbor lines, pierhead lines, leases and so forth, started out some place around the Canal and went through to San Leandro Bay; is that right?

Mr. Toole: Just a moment. I have a copy of my question here, your Honor, which is this: "Prior to the establishment of harbor lines between High Street and Park Street bridges in 1913, was the Government property between those bridges available for lease?"

The Court: I agreed you limited your examination, as far as I recall; and you several times said that very thing,—between those two,—and not on the Fruitvale Bridge.

Mr. Toole: The Fruitvale is in the middle.

The Court: But you have lines that lie between?

Mr. Toole: That is right. I object to any cross-examination in regard to leases and so forth outside of that territory as [433] outside the scope of direct examination.

The Court: I sustain the objection. That was the direct examination; that was his testimony. Of course, I don't know whether during the course of it the witness may have wandered from the area indicated.

Mr. Coakley: I had that impression.

The Court: But I do know all of the interrogatories—Of course, he may have volunteered some-

(Testimony of Henry S. Pond.)

thing—but all interrogatories were limited within that area. I noticed it particularly because I was wondering why he did it.

Mr. Coakley: Is it necessary, under the new rule, to take an exception?

The Court: You cannot expect me to advise you in the law, as I believe you are, asking me legal questions. There are a great many lawyers do that, who think there is no need for the formality of taking an exception. There is the other situation: the judge may, when he comes to decide, disregard anything not proper.

Mr. Coakley: I did not mean to take any advantage of any kind.

The Court: How can you tell whether the judge will not consider, in making his determination, if the record is a proper record? However, if you want to make any objections or exceptions, I would put them in. It is the general thought that, in civil matters, an exception is not used. We still have them in criminal matters.

Mr. Coakley: That was my impression; therefore, I have not been making them.

The Court: I believe you do have to indicate your objection like you do in the state court. There, you say it is incompetent and so forth, if you wish to make an objection.

Mr. Coakley: Q. Now, then, Captain, in connection with the establishment of harbor lines, do leases relating to the leasing of property belonging

(Testimony of Henry S. Pond.)

to the Government along the Tidal Canal, relate [434] to the establishment of harbor lines all separate and distinct?

A. We have no leases.

Q. When you did have leasings, was the lease related to the establishment of harbor lines?

A. I have not studied the lease records sufficient to answer "Yes" or "No." I mean, we went more carefully into harbor line matters; but these old lease agreements I did not study up; I did not know I would be called to discuss them in any detail. We can get the records.

Mr. Toole: Are you trying to secure a legal interpretation as to what a lease is?

Mr. Coakley: With reference to your entire testimony——

The Witness: Mr. Coakley, we have that file of leases here; and you can look at it, if you want. I brought it up in case we wanted it; but I have not studied it. I would prefer not to answer your question; I may be in error unintentionally.

Mr. Coakley: Q. With reference to your entire testimony today about harbor lines, generally speaking, you testified about the mechanics touching harbor lines and things related to harbor lines. Are the leases related to the establishment of harbor lines?

A. I have nothing to do with leases. I have to do with harbor lines. Leases are done by the admin-

(Testimony of Henry S. Pond.)

istrative department of my office; and I have nothing to do with them and cannot answer your question. I don't mean to refuse; —I have nothing to do with them.

Q. With reference to the location or area of the property leased,——

A. I have nothing whatsoever to do with the leases.

The Court: Q. Certain pieces of land have private leases, didn't you say? In other words, on your map? A. Yes, sir.

Q. You know where there were certain leases for private usage; but how they came to secure them, you do not know?

A. I do not know, sir. [435]

Q. All you know: your records show that land was being used for or allowed for private usage?

A. A little more than that. I have a recollection in my head, in glancing over the file in this case, hunting for harbor lines, I would see a lease marked so wide and so long; I didn't happen to see any lease marked to the harbor line; but I skimmed those, because I was looking for harbor lines; and so I do not want to testify as to leases, because I am not well acquainted with them. It is not my business.

Q. You do not know of any leases?

A. None whatsoever. There were no leases at any time that I have been with the United States—

(Testimony of Henry S. Pond.)

Of course, I have only been there since 1914. There was no need of leases after the establishment of these lines.

Mr. Coakley: Q. When you testified to the property made available for leasing, on direct examination, what were you referring to?

A. I was referring to the property that was being made available for use free of any lease or payment of rental or red tape of any kind, as endorsed on here—and has been the practice since I have been in the office.

Mr. Coakley: Q. Before 1909, property was made available by the Government for lease and use for wharves, piers and so forth along the Tidal Canal; isn't that correct?

Mr. Toole: I ask that be limited to the direct examination as to the Tidal Canal between the High and Park Street bridges.

The Court: I sustain the objection. I imagine that is within the scope of his direct examination.

Mr. Coakley: Q. Did I understand you to say there were no leases made after 1909?

Mr. Toole: Just a moment. The same objection.

The Court: He says he doesn't know anything about leases.

Mr. Coakley: Q. Between High Street and Park Street bridges, were any such made after 1909?

A. No leases made after 1913, [436] which was the time in which the Secretary authorized the use

(Testimony of Henry S. Pond.)

of that land by the abutting owners. If there were leases prior to that time, they are not any part of my job and are much earlier than my time, so much so that I do not know anything about them.

Q. At any rate, during your time, so far as you know, there have been no leases made between the High Street and Park Street bridges?

A. During my time, none whatsoever.

Q. That is from——

A. My time in the San Francisco office began September, 1915.

Q. And, so far as you have been able to ascertain from the records, no lease made after 1913 between High and Park Street bridges?

A. Yes—none made.

Q. At any time that any leases may be made by the War Department to anybody along this or any other navigable water area over which the Government has jurisdiction, they would be revocable at the will of the Secretary of War?

Mr. Toole: I object to that as a conclusion of the witness, no proper foundation laid, not within the scope of direct examination.

The Court: I sustain the objection.

Mr. Coakley: Q. With reference to your testimony to the effect that a certain area between the Park Street and the High Street bridges was made available free of charge and without leases, that permission—and it was permission, I take it? Is that right?

(Testimony of Henry S. Pond.)

Mr. Toole: That calls for the conclusion of the witness, too, your Honor. That is shown on the title sheet.

Mr. Coakley: It says "permission" on the title sheet.

Mr. Toole: That is it exactly; the title sheet shows for itself. This witness cannot testify as to whether or not permission given on a title sheet for abutting land owners to build warehouses in that area can be revoked; that is a matter for the powers of the Secretary of War—a power to be conferred by [437] Congress.

The Court: It would be asking for a legal conclusion. I sustain the objection.

Mr. Coakley: This question as to whether or not the making of the area available for use of property owners along the Tidal Canal between High and Park Street bridges without leases, as to whether or not it is revocable at will,—is the objection sustained?

The Court: That is right. It almost looked, though, like it might be a tenancy at will.

Mr. Coakley: Q. Prior to 1913, there were warehouses along the Tidal Canal between Park Street and High Street bridges, wern't there?

Mr. Toole: Just a moment. That is objected to as being outside of the scope of the direct examination.

The Court: I will sustain the objection.

Mr. Coakley: Q. Now, with reference to your

(Testimony of Henry S. Pond.)

testimony that there was no record showing the establishment of harbor lines before 1913—

Mr. Toole: Your Honor, I would like to correct that for the record. The testimony was there were no harbor lines between Park and High Street bridges prior to 1913.

The Court: I presume that he limits his question to that territory.

Mr. Coakley: Q. Calling your attention to this file and particularly to this letter dated March 20, 1914, Captain, is that letter a part of the record of your office with reference to the——

Mr. Toole: I will agree that letter is part of the official records.

Mr. Coakley: Q. ——and these are part of the records which you searched?

A. These records I searched earlier; but they have been in Mr. Toole's office; I have not seen them for quite a while. [438]

Q. Calling your attention to letter dated March 20, 1914, purporting to be signed by Thomas H. Rees, Lieutenant Colonel, Corps of Army Engineers, United States Army; and I ask you whether or not that is what it purports to be: a copy of a letter written by that department.

Mr. Toole: I will agree to it that it is a copy.

The Witness: A. Yes, that is a letter written by Rees, District Engineer at that time.

Mr. Coakley: Q. Particularly with reference to the last paragraph:

(Testimony of Henry S. Pond.)

"Harbor lines through the Canal were established as early as in 1893."

Mr. Toole: No proper foundation has been laid to read that. What is the purpose of this?

Mr. Coakley: Well, it has reference to the testimony as to whether harbor lines were established through the Canal in 1913.

Mr. Toole: Through that portion between High Street and Park Street?

Mr. Coakley: This is cross-examination.

Mr. Toole: There has been no testimony as to any harbor lines between those bridges prior to 1913.

Mr. Coakley: May I show this to your Honor; this last paragraph here?

The Court: He can read that and say if he has seen that.

Mr. Coakley: Q. Now, Captain, this letter—the latter paragraph of which reads as follows:

"Harbor lines through the Canal were established as early as in 1893. They were reestablished in their present locations by approval of the Secretary of War dated January 20, 1913."—— is a part of your records in your office? A. Yes. [439]

The Court: Q. But, in speaking of the writing in that regard, you do not know anything about the lines having been——

A. That is why I searched so diligently: to find out what the basis for the statement was. I was unable to find any basis for this statement.

(Testimony of Henry S. Pond.)

Q. You had seen that statement; and, on that basis, had made this investigation? A. Yes.

The Court: Proceed.

Mr. Coakley: Q. Now, then, Captain Pond, as a matter of fact, your records with reference to whether or not harbor lines were established in and through the Tidal Canal between Park Street and High Street bridges may have been destroyed in the fire of San Francisco in 1906?

Mr. Toole: That is calling for a conclusion, it seems to me; it may or may not have been destroyed. There may or may not have been records.

The Court: I think you would better ask if he has any information on it. I think that is so vague as to whether it may or may not have been. The questions you want answered are as to his knowledge.

Mr. Coakley: Q. Is it not possible, Captain, that any records with reference to the establishment of harbor lines in the Canal between these two bridges mentioned were destroyed in the fire of 1906?

A. I think there would have been copies in the printed reports of the Chief of Engineers, because that appeared to be the practice of that day; so I caused and had cause to search independently the printed reports of the Engineer; that is how I found this 1893 one; and I found none.

Q. Records and maps showing the situation with reference to harbor lines, if any, between Park

(Testimony of Henry S. Pond.)

Street and High Street bridges, would be in the Chief of Engineer's office in Washington, D. C., wouldn't [440] they? A. Yes.

Q. Did you communicate with Washington, D. C., and particularly the Chief of Engineer's office there, in connection with the question of whether or not harbor lines were in existence between these two bridges prior to 1913?

A. Not in connection with this case.

Q. Now, then, this map here which is designated as "Oakland Harbor, Harbor Lines Recommended," Exhibit 11, there are these lines here which are projected along the edges of the Tidal Canal. Calling your attention first to this dotted line on each side, what is that line? A. I do not know.

Q. What does it say, on the map, the line is?

A. The map says, "Pierhead Line," on that line in Brooklyn Basin a considerable distance to the west. The line is continuous and goes beyond Park Street.

Q. It goes east of Park Street?

A. East of Park Street; but the report says that the lines have reference to the city streets and all references end west of Park Street.

Q. But in so far as this map is concerned,—the map of September 20, 1893, is concerned, the line designated on this map as "Pierhead Line," does extend easterly of the Park Street bridge, that is, between Park Street bridge and High?

A. Easterly of the Park Street.

(Testimony of Henry S. Pond.)

Q. That would be between Park and High Street bridges? A. Yes.

Q. The same thing holds true with pierhead line which appears on the southerly shore of the Canal? A. Yes.

The Court: I presume we will have to go over to tomorrow the way things are going, because you thought two hours would be ample. I suppose it will be done early tomorrow morning. It is better to go over and have ample time to conclude.

(An adjournment was taken to Friday, March 22, 1940, at 10 a. m.) [441]

Friday, March 22, 1940

The Court: You may proceed with the case on trial,—United States versus the County of Alameda.

HENRY S. POND,

recalled.

Cross Examination

(Continued)

Mr. Coakley: Q. Captain Pond, yesterday you testified with reference to this Exhibit 10. Now, as I understand it, that is a document—rather, it reflects things which are contained in several different maps and documents; is that correct?

A. Yes.

Q. In other words, this is not a copy of any original map which is on file any place; but it does con-

(Testimony of Henry S. Pond.)

tain things which are contained in several different maps and documents? A. Yes.

Q. Now, yesterday you testified with reference to this colored area here, and particularly with reference to the dark shaded area; and that the dark shaded area represented the area taken advantage of by property owners after 1913. Do you remember that testimony?

A. I think I testified that the dark shaded area represented wharves which had been constructed by adjacent, abutting property owners, under that general license, with one exception.

Q. After 1913?

A. There is one exception: the concrete slope——

The Court: Q. Finish your answer.

A. ——at the Southern Pacific power house which is designated on the map, "Concrete Slope."

Mr. Coakley: Q. Some of this dark shaded area —rather, the development,—wharves, warehouses or whatever they are, represented by some of that dark shaded area,—took place before 1913?

A. I think my testimony was as between the Park Street and High Street bridges. Isn't that so?

Mr. Toole: That is my recollection. [442]

Mr. Coakley: Q. When you testified about this particular map, the dark shaded area, it represented the advantage taken by property owners after 1913. Now, this map, of course, covers the entire canal?

A. This map covers the entire canal.

(Testimony of Henry S. Pond.)

The Court: Q. Did you mean to only include between the two bridges?

A. My testimony, as to the wharves which took advantage of that license, was only between the two bridges.

Mr. Coakley: Q. There weren't any wharves and warehouses at the time of the few last questions, prior to 1913.

Mr. Toole: I object to that as not proper cross-examination, outside of the scope of the direct.

The Court: I will sustain the objection.

Mr. Coakley: Q. Prior to 1913, the Government had made a lease of waterfront area along the Tidal Canal, about 3200 feet; is that correct?

A. I said, yesterday, I didn't know anything about those leases. I cannot testify about the leases; they are not part of my office duty.

Q. Is it not a fact that, prior to 1913, the Government of the United States was receiving an income of about $800 a year for the lease of this area along the Tidal Canal there?

Mr. Toole: I object to that as being outside of the scope of the direct examination. I believe the Captain's testimony was confined only to the area between the bridges.

The Court: If it pertains to something between the two bridges, I will allow the question.

Q. Do you know anything about that?

A. I do know, sir, that there were no leases between the bridges.

(Testimony of Henry S. Pond.)

Mr. Toole: Prior to 1913.

The Witness: I know nothing of the leased area of Park Street except so general, so little, I could not testify as to areas that were leased, amount of revenue, or anything about them. They are under the administrative division of our office; and he would have [443] to testify.

Mr. Coakley: Q. As a result of the examination of the records, do you know, Captain, that the Government was receiving, was renting or leasing property along the Tidal Canal at, 25 cents a front foot, and had under lease approximately 3200 feet for which they derived $800.00 annual income?

Mr. Toole: That is objected to as being outside of the scope of direct examination.

The Court: I will sustain the objection.

Mr. Coakley: Q. Now, then, Captain, is it not a fact that prior to 1913 the Government had a number of leases with reference to waterfront property along the Canal which leases were five-year leases?

Mr. Toole: To which I object for the same reason, and the witness has said that he knows nothing about those leases, and it goes outside of the scope of direct examination.

The Court: He says he doesn't know anything about that.

Q. Isn't that correct?

A. No, sir; I do not know.

The Court: We are getting nowhere. The objection is sustained.

(Testimony of Henry S. Pond.)

Mr. Coakley: Q. With reference to this area about which you testified yesterday was made available for use or lease, the area to which you referred, in that respect, was the area between the bulkhead and pierhead lines; is that right?

A. On each side of the creek.

Q. On each side of the Canal?

A. The Canal.

Q. And the bulkhead line to which you testified was the boundary line of the Canal; is that correct?

A. The bulkhead line in the part between Park and High Street was laid on the boundary line as it then was.

Q. And that boundary line was the boundary line of the Canal, as set forth in the decree in the case of United States versus Crooks; isn't that correct? [444]

Mr. Toole: It seems to me that is calling for the conclusion of the witness. I am willing to stipulate.

Mr. Coakley: You are willing to stipulate?

Mr. Toole: Yes.

Mr. Coakley: I will accept the stipulation.

Q. This area to which you referred, was that dry land or was it land which was covered by water?

A. In part, one; and part, the other.

Q. Could you indicate, could you tell us, Captain, how much was dry land and how much was covered by water?

(Testimony of Henry S. Pond.)

A. No; I could not. I would have to refer back to a survey of that date and take the areas off with a clinometer or some instrument; and even then I would only have a high water line, as shown on the map.

Q. Is this the situation, Captain: that the Government, in digging the Canal, did not dig it out to the 400-foot width, but left along the edges, in places, land of varying widths which were inside of that 400-foot depth; is that right?

A. What the Government did was: they dug a channel 300 feet wide on the bottom; but the sides are not vertical; they are sloping,—in some cases, a slight slope; and, in some cases, flatter; so, the deep shoreline would become farther away where there is a flatter slope, due to different material or a different method of excavation, and the shoreline will be near the edge—near the bottom edge of the channel, as it is defined, 300 feet where the slopes stand steeper.

Q. At the top of this Canal, in some instances, it went 400 feet wide; and, in some instances, less than 400 feet? A. Yes.

Q. And as a result of that, there was a strip of a space between the boundary line——

Mr. Toole: I think that is outside of the scope of direct examination.

Mr. Coakley: This is with reference to area.

Mr. Toole: This witness has not gone into enough construction [445] so that he can explain the meaning——

(Testimony of Henry S. Pond.)

The Court: It is all this area between those two bridges, I presume?

Mr. Coakley: Yes, your Honor.

The Court: I will allow the question.

The Witness: A. There are strips of what we call high land on the Government property, if that is what you mean.

Mr. Coakley: Q. In some cases, that high land is inside of the 400-foot width?

A. That is, on the Government property.

Q. In other cases, the water line goes outside of the 400-foot width?

A. Back into private property.

Q. In other words, the line along there of what you call the high land is not absolutely straight; it varies; is that correct?

A. It is not absolutely along the boundary line of the Government property.

Q. Some places, in a few feet; and some places, out a few feet? A. Yes.

Q. Is that the area to which you referred?

A. No. Any private owner must still have permission to occupy Government land whether submerged or high land, say, the license, for occupancy of the Government land, in order that wharves might be constructed.

Q. The area to which you testified yesterday did not refer to this strip of dry, high land in instances, say, of the 400-foot area, at that time, but refers to all area only between boundary line and pierhead?

(Testimony of Henry S. Pond.)

A. My office has interpreted that to mean that the abutting owner may use all of the Government property while the pierhead was out. That has now been withdrawn, as I testified yesterday—that he could use all of the Government property to the pierhead line, whether it be high land or land under water.

Q. So we can clarify this question: When you testified yesterday, you were referring to the area indicated on the map between the [446] bulkhead line and the pierhead line?

A. Whether that area is high land or submerged land.

Q. Whether or not that is a narrow strip along the boundary line of the Government there along the Canal, of high land, dry land, it has nothing to do with this area which you testified to yesterday, which you say is between pierhead and bulkhead line; is that right?

A. If there is an area of high land on this map, on the Government property and between those two bridges, that is the area of high land generally related to the bulkhead line; even though it may not be excavated, the bulkhead is there.

Q. It will run maybe along high land?

A. It was along high land.

Q. Where the Government did not excavate back to the boundary line? A. Yes, sir.

Q. In other words, where the bulkhead line was on the water; is that right? A. Yes.

(Testimony of Henry S. Pond.)

Q. What I am getting at is this: When you testified that the area colored there, in the map, in red crayon was made available for use, you were referring to the area between the pierhead and the bulkhead line solely? A. Solely.

Q. Not where it did connect with the dry land, which, in some instances, is inside the bulkhead line, and some, outside the bulkhead line?

A. That has no bearing, whether part land or part water.

Q. Now, when the Government, in the establishment of harbor lines on San Francisco Bay Area, in 1913— What would you call that? A project?

A. No; it is just merely the establishment of harbor lines.

Q. In that respect, when the Government did that, at that time they made lines with reference to pierhead and bulkhead lines in other portions of the San Francisco Bay area; is that right?

A. Yes; I testified that yesterday. [447]

Q. In this case, the area between the pierhead and bulkhead lines was likewise made available for use?

Mr. Toole: Just a moment. That is entirely immaterial whether pierhead or bulkhead were established elsewhere on San Francisco Bay.

The Court: I sustain the objection.

Mr. Coakley: Q. With reference to the property made available by the establishment of the harbor lines between the Park Street and High Street

(Testimony of Henry S. Pond.)

bridges, was any of that property between Park Street and High Street bridges leased to anybody at any time?

A. Between Park and High Street bridges?

Q. Since 1913.

A. I cannot testify directly on that. I know that I found a request for a lease, in looking for the harbor line matter, and a reply saying it would not be leased. I found a request from the City of Alameda for some kind of lease—I don't remember exactly what it was—and a letter to the general effect that a request from the City of Alameda might receive favorable consideration; but I was looking for harbor lines, and skimming those things over very quickly.

Q. With reference to the area—By the way, when the harbor lines were established in the Canal, in 1913, they were established through the entire Canal; they weren't limited to Park and High bridges, were they?

A. The pierhead line was not extended the full length of the Canal; only the bulkhead line; but practically so, there was a little bit in San Leandro Bay to which there were no harbor lines.

Q. In the Canal? A. In the Canal.

Q. Outside of that portion which was in the Canal at the San Leandro end of it, were the harbor lines established in 1913 throughout the Canal?

A. Yes.

Q. Up to Brooklyn Basin?

(Testimony of Henry S. Pond.)

A. Throughout the whole Eastbay area [448] from Point San Pablo to a point south of Alameda.

Q. With reference to the property made available between Park Street and High Street bridges, was the method by which it was made available in writing; was that represented by any document such as a lease or license of any kind?

A. The method by which it was made available is the endorsement on the tidal sheet of the harbor line map which we have marked Exhibit 9. There were no papers on each individual occupancy.

Q. Now, then, the conditions under which that property was made available are with the Secretary of War to revoke that availability at any time?

Mr. Toole: That is objected to as calling for a legal conclusion. Exhibit 9, containing the endorsement of the Secretary, contains that, your Honor.

Mr. Coakley: Is it understood, then?

Mr. Toole: Yes; I think that statement speaks for itself.

Mr. Coakley: I didn't hear.

The Court: No; he says the information is contained in Exhibit 9.

Mr. Toole: I made the objection that it calls for his conclusion as to what the Secretary of War could do.

The Court: Here it is, anyway.

Mr. Coakley: Q. With reference to the area between the Park Street and the High Street bridges made available for use as you testified yes-

(Testimony of Henry S. Pond.)

terday, that area was changed by the Secretary of War after 1913; isn't that right?

A. The harbor lines were changed since 1913.

Q. In other words, pierhead and bulkhead lines were changed after 1913?

A. Pierhead; but not bulkhead.

Q. What was that change?

A. The pierhead was altered to coincide with the bulkhead.

Q. That put it back on the 400-foot boundary strip of the Canal? [449]

The Court: Q. In other words, that makes the Canal the full width of the Government strip?

A. Yes.

Mr. Coakley: Q. That would make the bulkhead line the whole length of the Government strip?

Mr. Toole Harbor line.

Mr. Coakley: Q. Harbor lines, in this case; when this change occurred, pierhead and bulkhead lines were the same?

A. The pierhead and bulkhead lines were the same; but they did not exactly coincide with Government property, because Harrison Street, Alameda has since been closed.

Q. With that exception?

A. With that exception and the two bridges, they coincide.

Q. That coincides with the boundary line of the Government ownership there? A. Yes.

Q. So that, now, with reference to any new de-

(Testimony of Henry S. Pond.)

velopment or advantage along there, the property owners cannot build wharves out beyond the pierhead and bulkhead lines which are conterminous with the Government ownership?

Mr. Toole: That calls for a conclusion, et [illegible] owners might get permission from th [illegible]

The Witness: There has been one [illegible]

The Court: What was the witness's statement?

(Record read)

Mr. Coakley: Q. With one exception, my statement on this question is correct; is that right?

A. There have been two requests for permits for wharves out to the former pierhead line since the lines were withdrawn. One request was approved; the other was not.

Q. That one request which was approved was the case of the Hutchinson Stone and Building Material Company?

A. The Hutchinson Company. [450]

Q. They already had two wharves there which had been there for many years? A. Yes, sir.

Q. By the way, how long had those wharves been there? A. I do not know.

Q. As a matter of fact, they have been there since 1910.

The Court: He says he doesn't know. You cannot get information of the witness that he does not know.

Mr. Coakley: Q. At any rate, the exception which was made to that ruling was that the area

(Testimony of Henry S. Pond.)

between these two wharves on the Hutchinson property could be filled in with another wharf out to the old pierhead line which was established in 1913?

A. Yes.

Q. In other words, to bring their two wharves together and bringing it out even with the old one; is that right? A. Yes.

Q. Now, the pierhead line along the Tidal Canal between Park Street and High Street bridges was moved back to the bulkhead line in 1929; is that right?

A. I do not know the exact date; but it was moved back recently—about that time.

Q. Now, in establishing harbor lines, is it necessary to have a special survey for that purpose alone?

A. Unless there are adequate, recent surveys, it is necessary.

Q. But where there are adequate surveys existing, then the harbor line can be laid down on the map without making a special survey for that purpose; is that right?

A. A small area of harbor line may be changed without special survey; but it is essential that harbor lines shall show definitely the development of the area at the time and accurately, so it is normally the practice to make a special harbor line survey. We are making such survey now in order to make the general revisions of the San Francisco bay harbor lines.

(Testimony of Henry S. Pond.)

Q. Now, with reference to leasing waterfront: yesterday, you testified generally with reference to harbor lines; and in that respect, in general, the establishment of harbor lines and leasing [451] of waterfront area, where it is Government property, is done for the protection of the waterfront; is that not right?

A. I did not say that the leasing of property was done for the protection.

Q. Let us say the establishment of harbor lines; limit it to that: the new establishment of harbor lines is done for the development and protection of the waterfront?

A. The establishment of harbor lines is done for the protection of navigable waters.

Q. So that abutting property owners cannot build piers, docks or wharves out too far into the channel and thus obstruct navigation?

A. Yes.

Q. And also so that the development within the shoreline will not, in a case where it is in a channel or river, interfere with the tidal prism; is that correct?

A. The interference with tidal prisms is becoming of less and less importance because of the development of efficient dredging. It was once of considerable importance. It is now considered of very little.

Q. Generally speaking, the Government establishes harbor lines so that, in the interest and aid of

(Testimony of Henry S. Pond.)

navigation and commerce, these people will not build up too far and thus obstruct navigation; is that correct? A. Yes.

Redirect Examination

Mr. Toole: Q. Captain Pond, you testified that the pierhead line was moved back to the bulkhead line between the two bridges somewhere around 1929; and your testimony is that docks had been built between the two bridges and the areas marked in dark blue on the map Exhibit——

A. Exhibit 10.

Q. ——but, as prior to the time that the pierhead line was changed. Are those structures still there? A. Yes, sir.

Q. Has the Government caused any of the people to move away or tear them down?

A. The Government has not required that they be taken down. [452]

Q. You testified on cross-examination that the purpose of establishing harbor lines is to protect and aid navigation in the navigable waters, and in aid of navigation. Ordinarily is the Government the owner of the land, as it was in the case here?

A. Not in California.

Q. Now, on the map marked Exhibit 10, there is a shoreline marked where the water evidently comes out beyond the boundary line of Government property. Is that shoreline a high water line?

(Testimony of Henry S. Pond.)

A. The shoreline, as on a map where there is a steep shore, is normally the top of the slope; while the high water line might be some intermediate point between there and the bottom of the channel.

Q. And where the contour of the land between the two bridges was such that it was dry land—a strip of dry land between pier and bulkhead line,—all abutting property owners were allowed to use that dry land as well as land under water out to the pierhead line? A. Yes.

Q. Without cost? A. Without cost.

Q. Captain Pond, on direct examination—with reference first to the map of September 20, 1893, marked Government's Exhibit 11—on direct examination, you testified that the harbor line stopped west of Park Street; and, on cross-examination, you testified that the line designated on the map as a pierhead line extended easterly of Park Street; that is, that would be between the Park Street and High Street bridges. Have you any explanation to clear up your testimony?

A. The report which I read from the Chief of Engineer's annual report states that the line had reference to the street,—Livingston, Dennison Street and Frederick Street; not Shasta Avenue; but the next one,—Canal Street; at each one of those streets, and similarly, in the City of Alameda, there is a distance out to pierhead and bulkhead lines. Then, in Alameda, Stanford Street, at Olivedo Street, at Taylor Street, where there is

(Testimony of Henry S. Pond.)

[453] not an angle point, the bulkhead line—at least, there is a distance out to it; all definite references—all definite references by which the line could be laid out, and west of Park Street. Very clearly, the line which is the pierhead line in Brooklyn Basin is extended beyond the Park Street—immediately east of Park Street bridge; but there is no reference by which a surveyor could locate that line on the water so as to guide a man to construct a wharf; so, I conclude that a draughtsman put it in.

Mr. Coakley: I ask that "I conclude," from there on be stricken out.

The Court: It may go out.

Mr. Toole: By consent.

Q. As an engineer, in interpreting this map, where would you say that the pierhead line ends?

Mr. Coakley: Object to that on the ground the map speaks for itself; it is the best evidence.

The Court: Unless he can read a map where a layman cannot. In other words, maps show certain things; and sometimes they do not appear to a layman as they do to an expert. You have to have an explanation of certain maps. I presume he can give his opinion.

Mr. Coakley: There is a pierhead line.

The Court: That is, too, what his matter is; that is a matter of explanation, subject to cross-examination how he reads that map, as to what it represents.

The Witness: Shall I answer?

(Testimony of Henry S. Pond.)

The Court: Q. Yes.

A. 741.2 feet west of Park Street.

Mr. Toole: Q. 741.2 feet west of Park Street. Would you make an "X" on the map and indicate that, for the record?

A. There is an arrow there already; there is an arrow point on the map at that point now.

Q. It is rather small, if those maps are reduced and photographed. [454] Now, Captain, as an engineer, how would you interpret that map as showing where the bulkhead lines are?

A. There is no question where the bulkhead lines are on the Alameda side,—Mulberry; and, on the Oakland side, Canal Street. It is very clear.

Mr. Toole: That is all.

Recross Examination

Mr. Coakley: Q. In that respect, I will call your attention, with respect to the testimony you have just given—I will call your attention to a lease between the War Department and Mr. R. R. Thompson dated September 26, 1905, for five years, with reference to a strip of land 400 feet long by 17 feet wide along the southerly side of the Tidal Canal in the vicinity of Park Street——

Mr. Toole: Is that east or west of Park?

Mr. Coakley: That is west of Park.

Q. I will ask you to look at the map attached to that lease, and state whether or not the pierhead line appearing on this lease here goes, as far as the map goes in this case, to-wit, to Park Street.

(Testimony of Henry S. Pond.)

A. Now, I would like to compare this with the map on the board.

The Court: Q. Well, you may do so.

A. On this lease, you have a wharf,—San Francisco Bridge Company Wharf,—and a wharfage area marked, "Proposed Wharf and Pierhead Line," marked on the outer side of those two wharves. The outer line of those two wharves, where you have got the words "Pierhead Line," is west of what I consider the pierhead line. There is nothing definite on your map that shows that the pierhead line extends easterly of those two wharves. There is a broken line on both shores. [455]

Mr. Toole: Q. You are referring to the map attached to this lease? A. Yes.

The Court: I suppose you should identify that document.

Mr. Coakley: I will do that, your honor.

The Witness: If the northerly broken line were labelled, "Pierhead Line," it extends on to the Park Street Bridge; the label "Pierhead" is immediately adjacent to those wharves. That line is not on a broken line; it is on a solid line of wharf.

Mr. Coakley: Q. Isn't it just a coincidence?

The Court: I don't know whether it is a coincidence. He could state what exists as far as the map discloses.

The Witness: But even if this were a correct portrayal of the pierhead line, it would have to be referred carefully to that map.

(Testimony of Henry S. Pond.)

The Court: Q. You do not feel that map continues; there is a variance between it and the map in evidence? A. I do not; no.

Mr. Coakley: I will identify this for the record.

The Court: For identification, Defendants' Exhibit "A."

Mr. Coakley: In fact, I will offer it in evidence at this time.

The Court: No objection?

Mr. Toole: Yes, I object, as being entirely immaterial.

The Court: Under the testimony, I suppose you testify that is a variance?

Mr. Toole: The map has not been connected with anything.

The Court: I will sustain the objection because it is not shown to the Court there is any connection.

Mr. Coakley: This has the seal of the War Department.

Mr. Toole: I so say, it is a map from the War Department.

The Court: The question is whether one map varies from the other. There is no evidence upon which I can receive it in evidence. If you have conflicting evidence, I will receive it.

Mr. Coakley: After all, the documents speak for themselves. [456] There are two lines going through the Park Street bridge on each side. On the south side, the line is marked "Pierhead Line." It is on the same line as the line of wharves here.

(Testimony of Henry S. Pond.)

I submit it is at least a question of fact as to whether or not this is an indication that the pier-head line——

The Court: The difficulty is this: You are speaking as a layman; I view it as a layman; I am not a map expert, although I have had many maps come before me. Here is a man not a layman; he says there is no variance he can discover. How am I going to put it in evidence as being at variance? I am certainly not going to take your statement, as a layman. We have nothing on which to predicate the variance.

Mr. Toole: Of course, no proper foundation has been laid. It has not been shown from what record that was drawn.

Mr. Coakley: I thought you stipulated this is an actual record lease of the War Department; the map is attached to the lease.

Mr. Toole: Yes; but I don't stipulate the map is correct or from what record it was drawn. Some clerk may have drawn it.

The Court: I think you are getting into a question of another point that is not before us. We have not the foundation to put it in, anyway. I imagine, if it was shown to be a true variance, even though it may have been inaccurate on the part of the War Department, we would have to receive it to show the variance. As I understand, this is a lease that has been——

Mr. Coakley: From the War Department.

(Testimony of Henry S. Pond.)

The Court: I don't think you have anything to put in evidence.

Mr. Coakley: Q. Let me ask you: With reference to your testimony, there is a variance between this map and the map on the board?

Mr. Toole: He said there was no variance.

The Witness: A. I said there was nothing to show clearly that there was a variance. [457]

Mr. Coakley: Q. What, in your opinion, as an engineer, is this line here on the north side; what does that represent? A. I don't know.

Mr. Toole: That is objected to; the document is not in evidence.

Mr. Coakley: Q. Calling your attention to Defendants' Exhibit "A,"—the map attached to a lease from the War Department to a man named Thompson, a property owner along the south side of the Canal——

Mr. Toole: I make the objection it is not material at all. The document has not been introduced.

The Court: Q. You cannot read that map to indicate a variance between it and the map in evidence? A. No, sir.

The Court: Where are we getting?

Mr. Coakley: This is cross-examination, your Honor.

The Court: Yes; but you have asked a number of times and he has given you the same answer.

Mr. Coakley: His answer is a conclusion.

(Testimony of Henry S. Pond.)

The Court: He is an expert; and experts can give conclusions. I fail to see the variance. Therefore, the matter of receiving the exhibit at this time in evidence has been denied.

Mr. Toole: And, for that reason, I object to any cross-examination in relation to the exhibit.

The Court: The witness apparently wants to make further deductions. I want to be sure, of course, if there is a variance here. I suppose we are entitled to have it considered.

Q. Tell us, from the stand, have you said anything to the reporter that I did not get?

A. I apologize, your Honor.

Q. You have a perfect right to go by yourself and examine it on the table without the interference of counsel.

A. I am sorry, your Honor. This map has, between broken lines, the words "Tidal Canal Channel 300 feet on bottom." It has no scale on it; but it has U. S. [458] property line on both sides, and that is 400 feet from one side to the other. So, with a ruler, I found this has a scale of 200 feet to the inch, and that the broken lines are 300 feet apart, according to the scale on the map. It is marked "Tidal Canal Channel 300 feet on bottom," although there are broken lines which were used to designate sides and bottom edge of the channel. So, I read this to mean this is the two edges of the 300-foot wide channel,—that broken line. The channel extends to the Park Street bridge.

(Testimony of Henry S. Pond.)

Mr. Coakley: Q. There was a pierhead line in that area?

A. There is marked, on the wharf frontage, "Pierhead Line."

Q. And that was on the same line as the channel line?

A. That was on the same line as the channel line.

Mr. Coakley: That is all.

Further Redirect Examination

Mr. Toole: Q. But where it is marked "Pierhead Line," it is a solid line in front of both wharves? A. Yes.

Q. The rest of the line is a broken line, which designates "Channel"? A. Yes.

Q. And there is no variance between that map which you hold in your hand, attached to the lease, and the map Government's Exhibit 11?

A. No; there is not.

Mr. Coakley: Q. The solid lines indicate wharf front?

A. Indicate wharf front; one in existence and one apparently proposed to be built.

The Court: You may proceed.

Mr. Coakley: That is all; I am through.

The Court: The ruling will stand.

Mr. Coakley: If there is no objection, the people who own the lease would like to have it back or withdrawn.

The Court: Are you through with it now?

(Testimony of Henry S. Pond.)

Mr. Coakley: Yes; I will be glad to substitute a photostatic copy. [459]

The Court: If the other side has no objection to the use, after giving a proper receipt therefor——

Mr. Coakley: May we substitute a photostatic copy?

The Court: You give the clerk a proper receipt, why, I will permit you to take it. Is that all of this witness?

Mr. Toole: That is all the Government has.

Mr. Coakley: That is all.

Mr. Foulds: With the consent of counsel, I will ask that the Captain be made our witness for the Railroad.

The Court: Your witness?

Mr. Foulds: For the purpose of our questions, yes.

The Court: Proceed.

HENRY S. POND,

recalled, for defendant Railway Companies; previously sworn.

Direct Examination

Mr. Foulds: Q. You live in Alameda?

A. I do.

Q. And have been familiar with the Fruitvale Avenue bridge there many, many years?

(Testimony of Henry S. Pond.)

A. Yes, quite a few years.

Q. Would you describe the structure, in a general way, to the Court; that is to say: is there one structure or two structures, one containing a roadway; and one, a street?

A. There is one structure, containing both roadway and railroad track and a pedestrian way, too.

Q. Is it a fact, Captain Pond, that the deck of the bridge is divided; part of it devoted to a railroad track, and one-half or two-thirds devoted to a paved street or right of way?

A. The deck is divided; and the bridge framework is in three trusses, with the railroad between two, and the highway between the center, the middle one and the other side.

Q. The highway connects, on the Oakland side, with Fruitvale Avenue, [460] and, with Alameda, Versailles Avenue? A. Yes.

Q. And it is an important public street extending from Oakland to Alameda?

A. I am not prepared to testify how important it is. It is a public way.

Q. It has been generally used; one of the prominent crossings across the estuary, is it not?

A. Yes.

Q. And has been for many years?

The Court: Q. It is in continuous use?

A. There has been continuous use a great many years as a public road—a public highway.

(Testimony of Henry S. Pond.)

Mr. Foulds: Q. So far as the structure is concerned, you would have to consider it as one structure with strengthening girders to provide for weight on one side and highway on the other?

A. Yes, sir.

Q. And the whole span itself is upon a single concrete pier?

A. It has a swing bridge which revolves on a center pier.

Q. And that center pier is in the middle of the estuary? A. Yes.

Mr. Toole: May it please the Court and with the consent of counsel, we would like to remove Government's Exhibits 11 and 12 in order to have photostats made.

The Court: If there is no objection.

Mr. Coakley: No, your Honor.

The Court: By giving proper receipt, it will be permitted.

Mr. Coakley: Will you supply us with a couple of copies.

Mr. Toole: Yes. I might say, in connection with the exhibits, that Exhibit "D," which is the annual report of the Corps of Engineers, 1874, was read into the record.

The Court: Only one page,—page 2506.

Mr. Toole: And, by consent of counsel, the record will be sufficient without photostats?

Mr. Coakley: I withdrew the request that they be photostated. [461]

The Court: By stipulation of counsel, that may be withdrawn entirely. Anything further?

Mr. Toole: Not for the Government.

The Court: The Government rests?

Mr. Toole: Yes, your Honor.

The Court: And the other side?

Mr. Coakley: We rest, with reference to the harbor line issue.

The Court: There is another issue?

Mr. Coakley: So far as the harbor line issue, we rest; but, as to the case itself, at this time we offer in evidence the stipulation of facts with reference to the transcript of the proceedings—of Major Mendell's testimony in the proceedings in United States versus Crooks, which offer we made yesterday and which was discussed at some length yesterday.

Mr. Licking: To which offer, if the Court please, we object on the ground that it is entirely immaterial to the issue, and introduced apparently to create a collateral issue; and, further, that it is a request to the Court to go behind the complaint, the findings of fact and the decree, in the case referred to. The complaint in the case referred to states quite clearly—I call your Honor's attention to page 8 of the complaint; it is an exhibit.

The Court: Let me ask you this—but not final on this point: What is your idea about this case? Are you going to submit to the Court without any further showing?

Mr. Licking: We have our brief prepared now and ready for filing now; but, if we have not a ruling on this point——

The Court: I thought you gentlemen were going to put in briefs?

Mr. Licking: That was not my understanding of it, because it is not possible to write a brief intelligently and reserve this particular point.

The Court: You could not get the alternative of it?

Mr. Licking: Not without writing two briefs.

[462]

Mr. Coakley: I think a section of the brief could be devoted to the alternative.

Mr. Licking: The Government is perfectly prepared to take the Court's ruling at this time.

The Court: Under the circumstances, you naturally would.

Mr. Licking: I am prepared to argue the matter out now, not at great length.

The Court: Could we do this: could you argue or brief this matter? This is of concern to the County of Alameda, because, naturally, my tendency is to believe that it is not admissible; but I am perfectly willing, so there will be no uncertainty, to have them present their case to see if they can persuade me I am in error. On my determination, of course, if I decide against Alameda, they have an exception to my ruling; and then the matter of the briefing of the problems would be had after that. Do you wish to make a showing or submit that issue?

Mr. Coakley: This is a question which I think should be briefed and argued; I mean the admissibility of this thing. I would like to have an opportunity to both brief it—at least, brief it, if not argue it.

The Court: How soon could you do that? Could that be done, for instance, next Monday—such a short time as that?

Mr. Licking: If the Court please, I think the matter might be argued at the present time; and we will submit our brief within a day after we get counsel's brief.

The Court: It seems to me, if you are going to do any searching of authorities, why give me an argument which may not be based upon a sufficient search? Why not give me the authorities? It is not necessary to appear orally. You are not going to persuade the Court; you are trying to convince him.

Mr. Coakley: I think that can be done. [463]

The Court: Supposing you do that; then comes the final issue. You want this matter determined. The first of April I am due in Sacramento; and will be sitting there for, I think, three weeks; and it is just possible I may go to another jurisdiction after that; it has not been settled; so I may be away several weeks more. If that would interfere with anything here, I do not want to do so. If it is a matter that is submitted, I will carry that with me; my submissions follow me.

Mr. Coakley: If you are going to be in Sacramento, we will be glad to go up there.

The Court: You can argue it there. When do you want to take the matter up, so far as submitting briefs on this issue, so we can get to the main issue?

Mr. Coakley: We would like to give the Court the benefit of our best research. I think, Tuesday or Wednesday, inasmuch as Easter Sunday is upon us.

The Court: I suppose, if you are religiously inclined, you probably won't work until after Easter.

Mr. Coakley: I have three kids to take out Sunday to hunt Easter eggs.

The Court: Put it this way: you will have your briefs in—Do you each want to write a brief separately, or reply?

Mr. Licking: Since I have never seen and am unable to find anything on this particular type of point, I would like to see the County's brief first. I think I can file our brief the next day after receiving the County's brief.

The Court: All right. They will take to and including the 27th to present their brief—March 27th, inclusive; and then you will put yours in, in three days from that?

Mr. Licking: After receipt of that, two days.

The Court: All right. I don't know whether there will be any reply after that or not. One day, I suppose; that will bring it [464] down to the 30th. I suppose you cannot submit it until after that, either one side or the other.

Mr. Licking: I will be in Sacramento and will be glad to submit the matter.

The Court: Then, we can probably arrange for the determination of that on both sides—Could both sides be ready then? Do you want to argue the case?

Mr. Licking: Not until after the briefs are in and your Honor has had an opportunity to consider the briefs.

The Court: I don't mean this point—not on this point.

Mr. Licking: I mean the main issue.

The Court: The whole case. Well, I suppose, if I am there two or three weeks, you can take some day.

Mr. Coakley: Then, as I understand it, we have until March 30th to file briefs in this matter.

The Court: By the 27th; you will either file or Mr. Licking will probably submit it; he will come in on the 28th, if he has no brief from you on the 27th.

Mr. Coakley: He has until the 29th; so the 30th will be his extreme limit?

The Court: Unless something unusual happens. I would not want to say—If it should happen that you run on some very important cases in this matter, by your diligence, I would not want to stop anybody from presenting anything that might be determinative. In the ordinary course of affairs, those things don't happen in ten years; so don't say I won't give you a chance.

Mr. Coakley: After the briefs are in, in this particular issue, then it will stand submitted without further order?

The Court: No; our rules require that either side come in and present it to the Court, which either side can do.

Mr. Licking: I will submit the matter formally in Sacramento. [465]

The Court: For instance, suppose you have until the 27th, and then, if Mr. Licking doesn't reply in two days, you never hear from him, you come in on the 30th and submit it. He doesn't take advantage of it unless he gets time.

Mr. Coakley: After this thing is submitted and determined, then we will submit the briefs on the entire case.

Mr. Licking: Our brief will be ready for submission within a day after your Honor decides this question.

The Court: If this matter is decided, you can make arrangements as to what the briefs are after that. As soon as I decide it and you know the decision, then you have briefs. How much time do you want on the main issue?

Mr. Coakley: Also, then, there is quite a lot of law involved.

The Court: Thirty days? We want to know the time.

Mr. Coakley: I would say fifteen days.

Mr. Licking: As I understand it, the County of Alameda, if we can determine this as expedi-

tiously as possible—the County will continue to operate. The *matter have* been attempting to hasten is for our benefit in that the County has presently only formally agreed to operate the bridge up until the 31st of this month.

The Court: Well, I presume we would have to have an understanding of that pending the decision in the case. Can you speak for the County?

Mr. McCreary: I cannot do so, although I am legal adviser to the Board of Supervisors; they have not decided that matter, but I am informed the matter will come to their attention at the first regular meeting date, which is next Tuesday. As a matter of fact, the understanding is that they will run and operate the bridge until the last day of March.

The Court: The only thing, I think, it should be operated until this matter is determined. The Court may have to take that [466] step for the protection of litigants.

Mr. Licking: I have not the complaint. As your Honor has doubtless observed, it contained originally a request for an alternative writ. However, with the County's agreement to operate to the 31st, there is a general sort of understanding, if we crowded it along, the County would go along with it. We have not requested that writ. Of course, if the County does not, we would feel that we must request a writ.

The Court: The County should do it; whether it goes one way or the other, there is still a question. That thing should be determined legally.

Mr. McCreary: I believe there is a good possibility, by Tuesday afternoon, the 28th, that Mr. Licking will not be asking this Court for any sort of writ. He would have time to do so.

The Court: Then, the main issue, after I determine the other one—the main issue comes up. Will fifteen, fifteen and five be satisfactory?

Mr. Licking: If the Court please, the Government would be satisfied with not to exceed two days after your Honor's ruling on this other question, because we have our opening brief prepared; we could almost waive the matter of filing opening briefs because the evidence is before the Court.

Mr. Coakley: If they want to reduce it to two, we will take ten.

Mr. Licking: If we have to reply, may we have ten days?

The Court: Two, ten and ten.

Mr. Licking: After the decision.

The Court: That is, the main issue. The second of that to run will be upon the determination of the Court of the preliminary issue.

Mr. Coakley: And I suppose at this time the Court would rule upon the admissibility of the corollary,—the other stipulation which represents 1874?

Mr. Licking: If the Court please, it is my understanding that the report—In the first place, it was not offered by the [467] Government as a corollary; it was offered independently, to show what had preceded the initiation of the condemnation ac-

tion; and it was my understanding that the Court did admit that record of 1874,—the report of 1874; that that was in evidence.

The Court: That has been stipulated to.

Mr. Licking: If the Court please, it is stipulated that is the report; that that report was made, but the County did make an objection to the materiality of the report.

Mr. Coakley: Now, I had understood that was admitted in evidence and was subject to a motion to strike.

The Court: I didn't know there was any objection to this report. I thought the objection was to the other.

Mr. Licking: If the Court please, I will take the Court's ruling on that point without briefing or any argument. That is historical of the situation; it defines the situation existing before the condemnation proceedings were entered into. Your Honor will notice it is a report of 1874.

The Court: Are you speaking of—or stipulating facts were offered in evidence by plaintiff subject to defendant County of Alameda as to the materiality?

Mr. Licking: Yes.

The Court: The Court has already received it. It was received when it was put in evidence. Nothing goes in evidence except what is in evidence. That is not an issue before us at the present time.

Mr. Coakley: It was received subject to a motion to strike.

The Court: I suppose you can make a motion to strike. That is already in evidence, as it stands.

Mr. Coakley: I make a motion to strike, for the purpose of the record.

Mr. Licking: I will take a ruling. [468]

The Court: The Court will deny the same. I presume we can adjourn. I thought all the evidence was in,—all defendants were acting together; that is the reason I asked if there was anything else.

Mr. Foulds: I would like to make a very brief showing on behalf of the Railroad.

The Court: Suppose you take the same time that the County takes,—the County of Alameda?

Mr. Foulds: The County, as I understand, is not going to put in any evidence.

Mr. Coakley: The situation is: all the facts are stipulated.

The Court: You want to put in evidence—testimony?

Mr. Foulds: I think, by stipulation, we should be able to put it in.

The Court: Oral testimony?

Mr. Foulds: If it is not stipulated to, I can prove, by oral testimony in five minutes.

The Court: Can you stipulate, you gentlemen? That doesn't affect me. If you can stipulate, take a stipulation to consider this in connection with the other.

Mr. Foulds: I know I can stipulate with the Government.

The Court: Here is the Government, to your left.

Mr. Coakley: Counsel has called this to my attention and it involves legal questions and angles which we have not had an opportunity to consider carefully enough; and I told counsel I could not stipulate to the proposed stipulation.

Mr. Foulds: The only thing is: if I can make a little statement of facts to which the Government agrees, if the County disagrees they can make——

The Court: Make that statement.

Mr. Toole: He can read this stipulation in as a stipulation [469] between the defendant Railroad Companies and the Government.

The Court: He wants it to be brought to bear on the other defendants.

Mr. Foulds: Oh, yes, I do. I think, on further consideration, the County will agree.

Mr. Coakley: At this time, we cannot stipulate. We have discussed the matter.

Mr. Foulds: If it is not stipulated, your Honor, I would like to take the stand.

The Court: There is nothing to prevent you from taking the stand; the only thing is: you cannot argue anything, because you would be arguing without any distinction between attorney and witness, which we look on with disfavor.

Mr. Foulds: Can counsel waive the point of disqualification?

Mr. Coakley: I will.

Mr. Toole: I will.

The Court: The Government, also?

Mr. Toole: The Government, also.

EDWIN J. FOULDS,

called for defendant Railroad Companies; sworn.

The Witness: If the Court please, I am an attorney at law and an officer of the defendant Railroad Companies; my title is "general attorney." I have been connected with them intimately since 1908, in a minor capacity until 1911; since which time, I have been one of their legal advisers and an officer of those companies. I have been, since at least, 1913——

Mr. Coakley: May I interrupt? It is rather difficult, where you relate in a narrative form—I didn't want you to ask questions of yourself; but, if I may interject, you say you are an officer. Designate which company you are an officer of. [470]

The Witness: I am an officer of the defendant Southern Pacific Company, and, as such, have entire jurisdiction, from a legal standpoint, over the subsidiary corporation,—the Central Pacific Railway Company.

Mr. Coakley: Q. In what capacity are you an officer—what official?

A. It is just one of our properties.

Q. Are you president, vice president?

(Testimony of Edwin J. Foulds.)

A. General attorney; that is a position recognized as a position of those companies.

The Court: Q. Legal or as a matter of fact?

A. As a matter of fact.

Q. Attorney in fact?

A. General attorney; which is an official position.

Mr. Coakley: Q. Are you a member of the board of directors?

A. No, sir. I was making a statement—I was about to make, regardless of qualifications, because I am personally familiar with things about which I will testify. These defendants hold no muniment of title whatsoever.

Mr. Coakley: That is a legal conclusion.

The Witness: I am very familiar with the facts.

The Court: I suppose an officer of the corporation can say, "I am familiar with the facts." Of course, as general counsel—and he speaks of it; he refers as being an officer of the defendant company.

Mr. Coakley: Q. When you use the word "officer," you are using it in the general sense in that you hold position as general counsel?

A. General attorneys by appointment of the board of directors.

Q. There are other attorneys in the legal department superior to you?

A. And also inferior.

Q. General counsel—what is his name?

(Testimony of Edwin J. Foulds.)

A. The general counsel is Mr. Ben C. Day. [471]

Q. So, when you use the word "officer," you used that in the general sense?

A. The general sense, yes.

Q. And not as in a designated official sense?

The Court: I don't know whether he would be authorized to testify as to title or not——

Q. Have you been authorized or granted that privilege to give this testimony at this time?

A. I am in charge of this case, yes.

Mr. Coakley: Q. Has the board of directors authorized you to relinquish any claim to title of any kind?

A. No, sir. I just want to state my familiarity with the subject and what the facts are.

The Court: Q. The question is whether you have the right to say that the Company has not the title. The only question is, this being a corporation, whether your capacity is such you have a right to make an admission for the corporation.

A. I started to say there are no muniments of title. I am familiar with the records of the Company,—documents, deeds, and everything relating to the subject matter. I have had occasion to investigate many, many times and am very familiar with this.

Mr. Coakley: Q. When you say "no muniment of title," that is a legal question, which would be determined by the documents—the decree and all

(Testimony of Edwin J. Foulds.)

these things. It is a legal conclusion, pure and simple.

The Court: Q. What do you desire to say?

A. My offer of proof is this: that these companies have no title.

Q. There is no issue of title?

A. I want to say they don't own the bridge; we don't claim to. All we have in this litigation is such limited right to use this bridge; we have neither deed, document or license or anything else.

Q. You are making this as an admission against the Company? A. Exactly.

Q. As attorney in the case?

A. I would state that the only ownership we have is in the rails, the track fastenings and the trolley [472] wires by which electric trains operate over the bridge, and the signal by which the bridge is connected with the block signal of the Railroad; in other words, the appurtenances. The ties have actually been laid there by us; and the wires, tracks, spikes and bolts that relate to the tracks, have been put there by us; but we disclaim any interest in any part of the structure itself, and we have no interest therein other than what I have stated. That is the purpose of my offer of testimony.

The Court: I suppose he is stipulating they make that admission against the interests of the Company.

Mr. Coakley: To protect the record, I move to strike the testimony on the ground it is incompe-

(Testimony of Edwin J. Foulds.)

tent, irrelevant and immaterial, mixed up with hearsay and conclusions of law and conclusions of fact, and not the best evidence.

The Court: How do you feel about it?

Mr. Toole: The Government has no objection.

The Witness: I was trying to shorten the testimony.

The Court: Q. Have you made all the statements you wish?

A. All the statements I wish, right now—of course, from a legal standpoint, that we may have some right to continuity of use, by the very fact that this Railroad is interstate and intrastate over the tracks, the only ownership we have is in the rails, the fastenings, and such rights as we have reserved in the decree in United States versus Crooks. I can tell the Court we have no other document in our possession that would purport to grant us any other right.

Mr. Coakley: Q. You feel you have a right of way there?

A. The limited right of use which is imposed as to crossings, except we are an important branch of commerce.

Q. You feel, as attorney for the Company, that the Southern Pacific [473] has a right of way across the Fruitvale Bridge, do you not?

A. The right of way and the construction of it would depend upon the construction of the decree.

Q. Now, if the United States government or the

(Testimony of Edwin J. Foulds.)

County of Alameda can take that right away—that right away——

Mr. Toole: I do not know whether it is proper for me to object. Counsel said, "the construction of the right of way would depend upon——"

The Witness: Whatever right we have in that decree; you can read as well as I can.

Mr. Coakley: Q. You believe that right is inalienable and continuous?

A. No; far from it. I say our rights are—and it is reserved by our predecessors in that decree.

Q. Decree in United States versus Crooks?

A. In United States versus Crooks.

Q. The Central and Southern Pacific have been exercising that right all these years since the decree in the Crooks case? A. And are now.

Q. The tracks there are part of that system?

A. General railroad system.

Q. Carrying both intra and interstate as well as local products? A. Yes.

The Court: Q. You never filed an answer?

A. Yes; we set up these facts very fully.

Q. And made this same disclaimer?

A. I think so. As a matter of fact, I have a stipulation of facts.

Q. Don't you know whether it is?

A. I would have to refresh my memory, by looking at it again.

The Court: If the answer has——

Mr. Coakley: I don't think it has. [474]

(Testimony of Edwin J. Foulds.)

The Court: Let us get the answer here.

The Witness: It is filed. It may not be in the file. I have an extra copy with me somewhere.

Mr. Toole: I don't believe, as I remember the answer, that it is a duplication.

The Court: I am asking if the answer disclaims it; that would cover the field entirely.

The Witness: I don't think there is any issue between us at all.

Mr. Coakley: Q. There might be an issue as far as the County is concerned. Is it not a fact that the Southern Pacific and the Central Pacific Railway Companies claim a right to have that bridge operated and maintained?

A. We claim such, yes; that is our construction of the decree in United States against Crooks.

Q. As a matter of fact, you claim that the United States has a legal duty and obligation to maintain, operate and keep in repair the Fruitvale Avenue bridge; is that correct?

A. Yes; that is our construction of the decree in the case of United States versus Crooks.

Q. And it has always been the position and construction of the people whom you represent?

A. That is right.

Q. That the United States government has a duty and an obligation, under the decree in United States versus Crooks, to maintain, operate, keep in repair and replacement, if necessary, the Fruitvale Avenue bridge; is that right?

(Testimony of Edwin J. Foulds.)

A. We make that claim; and that is our construction of the decree.

Q. And that they have that duty and obligation to the Southern Pacific and the Central Pacific Railway Companies? A. That is right.

Q. And anyone having a right of way on that bridge, by virtue of the decree in United States versus Crooks——

A. I think you are going a little far; but, as far as we are [475] concerned, we have those rights in the decree and no other right in the structure.

Q. To simplify the thing, it is your opinion, under the decree in the Crooks case, the Southern Pacific Company, as successor of Central Pacific Railway Company, has a right of way across the bridge there?

A. Yes; that is the way we construe the decree.

Q. In connection with your rights under the Crooks case, the United States government is bound to maintain and keep in repair, operate or replace, if necessary, the Fruitvale Avenue bridge?

A. Yes, sir.

Mr. Toole: One or two questions, Mr. Foulds:

Q. I take it, as far as the Railroad Companies are concerned, it makes no difference as to whether the County or the Railroad operates the bridges?

A. No, sir.

Q. But you look to the United States to do it if the County does not?

(Testimony of Edwin J. Foulds.)

A. We look to the United States directly; but we do not wish to be innocent bystanders or stand idly by. What I did intend to say was: whether the County or the United States operated the bridge——

Q. That is the way I understood you to say. You testified that the Railroad Company owned the tracks, the signal apparatus, the wires, and things of that kind,—the Railroad equipment on the bridge? A. Yes.

Q. Did the Railroad pay for the operation and maintenance of that particular material?

A. For the tracks and wires, furnished and paid for the maintenance, at all times.

Q. With reference to the ties and tracks and that part of the structure, that is all an integral part of the bridge, is it not: the tracks and ties?

A. No; it is not part of the structure of the bridge; it is laid on the bridge.

Q. It is permanently attached by bolts?

A. Now, you are getting [476] into a technicality.

Q. Isn't that a fact?

A. I feel, there, the ties must be fastened to the bridge; otherwise, they would shift.

Q. The tracks, ties and things that carry the trains across are part of the superstructure of the bridge?

A. No, sir; the tracks and ties could be removed, and the bridge would be just as good as it is now.

(Testimony of Edwin J. Foulds.)

Q. Now, the ties and the tracks are attached to the bridge? A. Yes, sir.

Q. And the part of the bridge to which the tracks and ties are attached, and the other apparatus you mentioned, were from time to time maintained by somebody else other than the United States government or the County?

A. The ties have always been maintained by the Railroad Company.

Q. The part of the bridge to which it is attached has been maintained——

A. Oh, yes; the structure of the bridge.

Q. ——maintained by either the United States government or the County? A. Oh, yes.

Q. And you have only maintained the trackage in between the ties?

A. The rails and ties themselves have always been maintained by us.

Mr. Coakley: Q. You were asked by Mr. Toole some questions about your position and the position of your Company with reference to the Government. You are familiar with that as a result of handling this matter for the Southern Pacific Company and the Central Pacific Railway some years?

A. Yes.

Q. And it is a fact, is it not, that the United States government attempted to have the Southern Pacific and Central Railway Companies release them from any obligation to maintain and operate the bridge for the Railroad Companies; is that right?

(Testimony of Edwin J. Foulds.)

A. Well, that particular matter that you are referring to was not handled by me.

Q. You are familiar, by being familiar with the case, to know that [477] happened?

The Court: Are you speaking as counsel or witness?

Mr. Coakley: Both.

The Witness: A. I would accept your statement, and Mr. Toole's, in that respect.

Mr. Coakley: Q. From your familiarity with the papers and documents, as attorney for the Southern Pacific Company—you know that the Government attempted to have the Southern Pacific and the Central Pacific release it from the obligation of maintaining, operating and keeping in repair the Fruitvale bridge, for the Southern Pacific and Central Pacific Railways?

A. Yes.

Q. And that the Southern Pacific and Central Pacific Railways refused to release the United States government, under the decree in the Crooks case, from the obligation to maintain, operate, keep in repair, if necessary, the Fruitvale Avenue bridge? A. That is correct.

Mr. Toole: I am willing to stipulate that the United States attempted to get the consent of the Railroad Companies to have the County substituted for the United Statets for any duties to the United States; and the Railroad Companies refused.

The Witness: That is correct.

(Testimony of Edwin J. Foulds.)

Mr. Coakley: Q. And also, Mr. Foulds, in addition to the cost of repairing the superstructure of the bridge itself, the operation of the bridge has been paid for, in recent years, by the County of Alameda; is that correct?

A. I assume that is correct. I accept your statement.

Q. At least, the Southern Pacific and the Central Railway did not pay?

A. We did not pay.

Q. Salaries for bridge tender have always been paid by someone other than the Southern Pacific and the Central Railway; and the electric power,—the electricity used in operating and turning [478] the bridge,—that is not paid for by the Southern Pacific or the Central Pacific Railways?

A. That is correct.

Q. It is paid for by the party operating the bridge? A. That is right.

Q. In recent years, Alameda County; is that right?

A. That is my understanding. In other words, we have not been given possession of the bridge structure itself; possession has been limited to rails, tracks and trolley wires.

The Court: Was that stipulation accepted?

Mr. Toole: The Government accepted it.

The Court: Do you accept the Government stipulation?

Mr. Coakley: I didn't accept any stipulation.

(Testimony of Edwin J. Foulds.)

The Court: It seems to me that, used as a disclaimer, what he has offered there as a witness—if he were making a claim of some sort, there would be a serious issue as to whether he had a right to represent a company in a matter of title; but here, as a disclaimer, he is making certain admissions; as far as admissions against the Company,—a disclaimer as to the rights of his Company,—I don't see why it should not be received here as a witness or a lawyer. Is there any objection to that?

Mr. Licking: I don't see any objection. I think it goes further to the general issue of the case. If ownership of particular physical property in the bridge is at issue, I think the statement of the witness goes to the whole case, not only as interest of the Company; he is proving the facts.

The Court: I think that would be the force of his testimony.

The Witness: As a matter of fact, if the Court please, I wish my statement as to disclaimer to apply to this whole period ever since the tracks are there on the bridge and the bridge has been there.

The Court: I think you have covered the field very well. [479]

Mr. Toole: The Government rests.

Mr. Coakley: So there won't be any misunderstanding, I feel I cannot stipulate to anything along these lines.

The Court: The stipulation was offered; and you apparently looked in his direction and looked away,

and you went in a huddle with your associates, and there was no reply. All I was wondering was if it was a mistake, if you did not recall it was an oversight or ignored the stipulation, or rejected it.

Mr. Coakley: I rejected the stipulation.

The Court: I believe, now, we can adjourn.

[Endorsed]: Reporter's Transcript. Filed Feb. 7, 1941. [480]

[Endorsed]: No. 9748. United States Circuit Court of Appeals for the Ninth Circuit. County of Alameda, (a Body Corporate and Politic, and a Political Subdivision of the State of California), Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed February 17, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9748

COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Political Subdivision of the State of California), Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

APPELLANT COUNTY OF ALAMEDA'S DESIGNATION OF THE PORTIONS OF THE RECORD ON APPEAL TO BE PRINTED.

The appellant County of Alameda having on the 17th day of January, 1941, taken its appeal from the final judgment made and entered in the above entitled action in favor of the appellee United States of America and against the appellant County of Alameda on the 21st day of October, 1940, by the United States District Court for the Northern District of California, and the parties hereto having designated the portions of the record, proceedings and evidence to be contained in the record on appeal, and the Clerk of the United States District Court for the Northern District of California having under his hand and the seal of the Court transmitted to the above entitled Court a true copy of the matters designated by the parties to be contained in said record on appeal, and the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit having filed said record on appeal

and having entered the same upon a docket of said United States Circuit Court, the appellant County of Alameda does hereby serve upon the appellee United States of America and the defendants Central Pacific Railway Company and Southern Pacific Company and does hereby file with the above entitled Circuit Court a designation of the following portions and pages of said certified record to be contained in the printed record on said appeal:

I.

Page 1 line 1 to page 19 line 14, inclusive, of said certified record on appeal;

Page 27 line 1 to page 29 line 9, inclusive of said certified record on appeal;

Page 35 lines 21 to 27, inclusive, of said certified record on appeal;

Page 54 line 1 to page 163 line 30, inclusive, of said certified record on appeal;

Page 170 lines 5 to 27, inclusive, of said certified record on appeal;

Page 187 lines 17 to 25, inclusive, of said certified record on appeal;

Page 188 of said certified record on appeal;

Page 190 line 1 to page 200 line 9, inclusive, of said certified record on appeal;

Page 206 lines 24 to 30, inclusive, of said certified record on appeal;

Page 225 line 1 to page 230 line 14, inclusive, of said certified record on appeal;

Page 236 lines 29 and 30, inclusive, of said certified record on appeal;

Page 237 of said certified record on appeal; and Page 239 line 1 to end of said certified record on appeal.

II

The entire reporter's transcript consisting of pages 1 to 104, inclusive, of the proceedings at the trial of said action on the 21st and 22nd days of March, 1940.

III

Stipulation of Facts with reference to Offer of Evidence by Plaintiff, Subject to objection of Defendant, County of Alameda, as to Materiality, together with Exhibit I—Report of Chief of Engineers AA5 San Antonio Creek, San Francisco Bay, California, attached thereto, introduced in evidence as Plaintiff's Exhibit VIII.

IV

Fifteen (15) copies of each of the following Exhibits (maps) are herewith furnished by the Appellant County of Alameda to be inserted in said printed record on appeal in lieu of being printed, pursuant to stipulation of the parties hereto and the approval of the above entitled Court:

1. Map of Tidal Canal Prepared by United States Army Engineers Office 1882, introduced in evidence as Plaintiff's Exhibit I, attached to Agreed Statement of Facts, and designated therein as Exhibit 1 (b), and numbered in the certified record on appeal as page 189.

2. Map of Tidal Canal as of 1909, introduced in evidence as Plaintiff's Exhibit II, attached to Agreed Statement of Facts, and designated therein

as Exhibit 2, and numbered in the certified record on appeal as page 238.

3. Title Sheet of Maps of San Francisco Bay, California, Showing Harbor Lines Prepared by the San Francisco Harbor Line Board, 1912, introduced in evidence as Plaintiff's Exhibit IX.

4. Map of Tidal Canal, Oakland Harbor, California, Showing Pierhead and Bulkhead Lines Submitted by San Francisco Harbor Line Board June 11, 1912, Approved by Secretary of War June 3, 1913, File Numbered 30-8-35, Sheet 5, introduced in evidence as Plaintiff's Exhibit X.

5. Map of Oakland Harbor showing Harbor Lines Recommended by the Board of Engineer Officers October 11, 1888, introduced in evidence as Plaintiff's Exhibit XI.

6. Map of San Francisco Bay dated April 25, 1918, Showing Pierhead and Bulkhead Lines, introduced in evidence as Plaintiff's Exhibit XII.

Dated: February 17, 1941.

RALPH E. HOYT,

District Attorney in and for the County of Alameda, State of California.

J. F. COAKLEY,

Chief Assistant District Attorney in and for the County of Alameda, State of California.

ROBERT H. McCREARY,

Assistant District Attorney in and for the County of Alameda, State of California.

CECIL MOSBACHER,

Deputy District Attorney in and for the County of Alameda, State of California.

Attorneys for Appellant, County of Alameda.

Service and receipt of a copy of the attached Appellant County of Alameda's Designation of the Portions of the Record on Appeal to be Printed is hereby admitted this 17th day of February, 1941.

FRANK J. HENNESSY,
United States Attorney.
W. E. LICKING,
Attorney for Plaintiff and Appellee, United States of America.
E. J. FOULDS,
Attorney for Defendants Central Pacific Railway Company and Southern Pacific Company.

[Endorsed]: Filed Feb. 17, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF THE POINTS ON WHICH APPELLANT COUNTY OF ALAMEDA INTENDS TO RELY UPON APPEAL.

The above entitled Court having made and entered a final jugment in the above entitled action in favor of the appellee United States of America and against the appellant County of Alameda on the 21st day of October, 1940, and the appellant County of Alameda having on the 17th day of January, 1941, taken its appeal from said final judgment to the United States Circuit Court of Appeals for the

Ninth Circuit, and having filed in said Court the record on appeal together with a designation of the portions of said record to be printed, the appellant does hereby serve upon the appellee United States of America and the defendants. Central Pacific Railway Company and Southern Pacific Company, and hereby files with the above entitled Court a concise statement of the following points on which it intends to rely on said appeal:

I.

That the fact set forth in paragraph V of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The Tidal Canal was not open to navigation" is erorneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact: "The Tidal Canal was navigable in fact".

II.

That the fact set forth in paragraph VII of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The defendant railroad companies claim no right or title in the Fruitvale Avenue bridge except those rights conferred upon them, or their predecessors, by the decree in United States v. Crooks, et al." is erroneous in that said fact is contrary to the evidence

adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact: "The defendant railroad companies claim a right to have the Fruitvale Avenue Bridge operated, maintained, repaired and whenever necessary, replaced by the plaintiff under the decree in United States v. Crooks, et al."

III.

That the facts set forth in "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action are erroneous and insufficient in that from the evidence adduced at the trial and from the facts set forth in the stipulations of facts filed in said action the Court erred in not finding the following additional fact: "In the Rivers and Harbors Act, approved June 25, 1910, 36 Stat. 630, c. 382, it is provided, inter alia, as follows:

> 'Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secre-

tary of War may be essential to meet the terms of said transfer.' "

IV.

That the fact set forth in paragraph XI of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made available to adjacent property owners, a twenty-five foot strip of property along each side of the Canal for the construction of wharves and warehouses" is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact:

"Between September 3, 1910, and November 10, 1913, the plaintiff installed electrical operating machinery on the said bridges and thereafter the bridges were operated, maintained and repaired by the County of Alameda instead of the plaintiff.

"In 1910 a harbor line survey was made for San Francisco Bay for the purpose of establishing harbor lines in said area pursuant to recommendation of the Board of Engineers of the United States Army and authorization of Congress previously made.

"In the making of said survey a survey made prior to 1876 for the purpose of the condemnation action of United States v. Crooks, et al was used in

the preparation of the map of harbor lines of the Tidal Canal and San Leandro Point Area as shown on Map, or Sheet, No. 5 (Plaintiff's Exhibit 12).

"The endorsement on the "Maps of San Francisco Bay, Cal., showing Harbor Lines Prepared by the San Francisco Harbor Line Board 1912", including Plaintiff's Exhibit 12, read as follows:

'War Department
"Washington, Jany. 20, 1913.

"The harbor lines shown and described on the accompanying maps, viz: San Francisco Nos. 1, 2 & 3, and San Francisco Bay Nos. 1 to 7 inclus. are approved to supersede all harbor lines previously approved for the localities shown thereon.

ROBERT SHAW OLIVER,
Asst. Secretary of War.'

"The harbor lines thus approved were revocable at will by the Secretary of War and were in fact revoked in 1929 by the Secretary of War, at which time they were changed by moving the pierhead lines back to the bulkhead lines so that thereafter said lines were coterminous with the property lines of the property adjoining the Tidal Canal.

"The area between pierhead and bulkhead lines as shown on Plaintiff's Exhibit 10 was made available for use by adjoining property owners at the pleasure of the plaintiff and without special lease of any kind as shown by the endorsement on the title sheet of Plaintiff's Exhibit 9 reading as follows:

'War Department.

"Washington, June 3, 1913.

'The owners of property abutting the lands included in the right of way acquired by the United States for the Oakland Tidal Canal shown on accompanying Sheet No. 5 are hereby authorized and permitted to occupy with open-work non-permanent structures for wharf purposes, the portions of the strip of U. S. property fronting their respective properties and situated between the pierhead and bulkhead lines approved Jan. 20, 1913, without special lease or charges of any kind, it being expressly understood that this permission is revocable at any time when this area may be again required for purposes of navigation and shall not be construed as a relinquishment of the Government title to the said right of way.

HENRY BRECKINRIDGE

Asst. Secretary of War.' "

V.

That the fact set forth in paragraph XVI of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of County of Alameda v. Ross, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460", should have read as follows:

"On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of County of Alameda v. Ross, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460. Said County subsequently agreed to operate said Bridge until March 31, 1940, but in so doing it was agreed that said County waived no rights, expressly retained all rights it might have in the premises, and that the position of the County of Alameda in this suit was not to be prejudiced in any way by such operation. It was further agreed that should said County subsequently agree to operate said Bridge after March 31, 1940, or should said County in any manner continue to operate said Bridge, that said County would thereby waive no rights, but would expressly retain all rights it might have in the premises, and that the position of the County of Alameda in this suit would not be prejudiced in any way by such operation or by such extension or extensions of time."

VI.

That the fact set forth in paragraph XVIII of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The Court, in the said case of County of Alameda v. Ross, supra, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909", is incomplete and erroneous in that said fact is contrary to the evidence ad-

duced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact:

"The Court, in the said case of County of Alameda v. Ross, supra, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909, but said resolution was incorporated in the resolution of the Board of Supervisors of the County of Alameda of November 10, 1913, which latter resolution was before said Court. The United States was notified by the District Attorney of the County of Alameda, as counsel for the County of Alameda, of the filing of said 'Petition for Writ of Mandate' in said action. Copies of all papers filed in said action by both petitioner and respondent, including the stipulation of facts and all briefs, were sent to and received by the United States Attorney in San Francisco during the proceedings and before the case was submitted."

VII.

That the conclusion of law contained in paragraph I of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That the County of Alameda and the United States entered into a valid, binding contract, as evidenced by the Resolution adopted by the Board of Supervisors of said County on December 6, 1909; by the License issued by the Secretary of

War on September 3, 1910; and the Resolution adopted by the Board of Supervisors of said County on November 10, 1913", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the resolution adopted by the Board of Supervisors of the County of Alameda on December 6, 1909, the license issued by the Secretary of War on September 3, 1910, and the resolution adopted by the Board of Supervisors of said County on November 10, 1913, did not constitute a valid contract and that neither the County of Alameda nor the United States is now or has ever been bound thereby.

VIII.

That the conclusion of law contained in paragraph II of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That under said contract the said County of Alameda is obligated to maintain, operate, repair, or rebuild said Fruitvale Avenue bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that there

not being now and never having been a valid and existing contract between the United States and the County of Alameda, that the said County of Alameda is not now and never has been obligated to maintain, operate, repair or rebuild said Fruitvale Avenue Bridge.

IX.

That the conclusion of law contained in pargraph III. of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The County of Alameda is now estopped to set aside its contract with the United States to maintain, operate, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda for the said County to maintain, operate, repair or rebuild the said Fruitvale Avenue Bridge is ultra vires and that the said County of Alameda is not now and never has been estopped to set aside the said alleged contract.

X.

The the conclusion of law contained in paragraph IV of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above

entitled action, which said conclusion reads as follows: "The County of Alameda had and has authority to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that neither the County of Alameda nor its Board of Supervisors now has or ever has had the authority to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge.

XI.

That the conclusion of law contained in paragraph V of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "Congress had and has power to authorize the County to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the Congress of the United States has not now and never has had the power to authorize said County of Alameda to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge.

XII.

That the conclusion of law contained in paragraph VI of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge were and are not gifts to a private corporation of public money prohibited by Section 31 of Article IV of the California Constitution", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge are and always have been gifts of public money or things of value to individuals and municipal or other corporations, prohibited by Section 31 of Article IV of the Constitution of the State of California.

XIII.

That the conclusion of law contained in paragraph VII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the County of Alameda and the United States does not violate Section 18 of Article XI of the Constitution of Cali-

fornia forbidding a County to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the County of Alameda and the United States violates Section 18 of Article XI of the Constitution of the State of California, which said constitutional provision forbids a county's incurring any indebtedness or liability exceeding in any year the income and revenue provided for such year.

XIV.

That the conclusion of law contained in paragraph VIII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the United States and the County of Alameda is not void for lack of mutuality", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda is void for lack of mutuality.

XV.

That the Court erred in not concluding as a matter of law that the alleged contract between the United States and the County of Alameda was void for lack of consideration and that neither of said parties is now or ever has been bound thereby.

XVI.

That the conclusion of law contained in paragraph IX of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the United States and the County of Alameda is not void for uncertainty", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda is void for uncertainty, both because of the cancellation clause contained therein and because of the ambiguity of its provisions.

XVII.

That the conclusion of law contained in paragraph X of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The courts of the State of California had no jurisdiction to determine substantial rights of

the United States in County of Alameda vs. Ross, 32 Cal. App. (2d) 135; 89 Pac. (2d) 460", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the judgment of the District Court of Appeal of the State of California in the matter of County of Alameda v. Ross, 32 Cal. App. (2d) 135, 89 P. (2d) 460, interpreting the statutes, constitutional provisions and case law of the State of California in regard to the powers and limitations of powers of boards of supervisors and counties and setting forth the substantive law of that State, is binding upon the United States District Court in the present action and that said Court is without authority to interpret said statutes, constitutional provisions and case law or to determine the said substantive law of said State contrary thereto.

XVIII.

That the conclusion of law contained in paragraph XII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That the counter claim of the defendant County of Alameda be dismissed and said defendant County take nothing thereby", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in

the stipulations of facts filed in said action and to the law applicable to said facts, and in that the Court should have concluded as a matter of law that the counterclaim of the defendant County of Alameda should be granted and that the United States is obligated to operate, maintain, repair and when necessary, to rebuild or replace said Fruitvale Avenue Bridge and that the County of Alameda is forever relieved, released and absolved of any obligation, liability, duty or responsibility in connection with the control, operation, maintenance, repair and rebuilding of said Fruitvale Avenue Bridge.

XIX.

That the Court erred in not concluding as a matter of law that the alleged contract between the United States and the County of Alameda not specifying any time for which said County was bound to maintain, repair and if necessary, replace the Fruitvale Avenue, Park Street and High Street bridges, was contrary to public policy and void and/or that said contract being silent as to the time of its duration was substantially complied with after a reasonable time and/or that said contract having failed to specify the term for which the obligation was to continue, was terminable at the will of either party.

XX.

That the Court erred in not concluding as a matter of law that equity will not enforce perpetual contracts or contracts which are uncertain as to the

length of time of performance or compliance as to their terms.

XXI.

That the Court erred in not concluding as a matter of law that equity should not decree specifiic performance of said alleged contract which is oppressive, unjust and unconscionable.

XXII.

That the Court erred in admitting over the defendant County of Alameda's objection the report prepared by G. H. Mendell, Major of Engineers, and others, dated at San Francisco, California, February 16, 1874 (Rep. Tr. p. 13).

XXIII.

That the Court erred in refusing to admit in evidence the "Stipulation of Facts with Reference to Offer of Evidence by the Defendant, County of Alameda," together with Exhibit I attached thereto, which said exhibit contained a Statement of Motion for a New Trial on behalf of Defendant Alfred A. Cohen in the matter of United States v. Crooks (lodged March 21, 1940), which said exhibit set forth the testimony of the witness Major G. H. Mendell given at the time of said motion in the matter of United States v. Crooks, et al., which said testimony explained the report of the said Major Mendell of February 16, 1874, and set forth the details of the construction of said Tidal Canal and purposes for which said Tidal Canal was to be

constructed and particularly the fact that said Tidal Canal was to be navigable.

XXIV.

That the Court erred in refusing to admit in evidence the "Stipulation of Facts with Reference to Offer of Evidence by Defendant, County of Alameda," to the effect that Major G. H. Mendell, also known as George H. Mendell, Major of Engineers of the United States Army, referred to in the "Stipulation of Facts with reference to Offer of Evidence by Defendant County of Alameda subject to Objection of Plaintiff as to Materiality" on file herein, was deceased prior to the commencement of this proceeding and during his lifetime was the same party named as defendant in the case of United States v. Crooks, et al., which said Stipulation was lodged in the instant case on the 26th day of March, 1940.

XXI.

That the Court erred in overruling the defendant County of Alameda's motion to strike from the record all testimony of the plaintiff's witness, Henry S. Pond, given on direct examination, which said motion was based on the ground that said evidence was incompetent, irrelevant and immaterial; that it did not involve any of the issues of said case; that it did not establish any consideration for the assumption of control by the County of Alameda of said bridges or any consideration for any alleged agreement between the said County and the United States Government, and that any such purported

agreement between said County and said Government was void and illegal because it was beyond the power of the Board of Supervisors and contrary to the Constitution of the State of California in that it would constitute a gift of public funds to private corporations and an expenditure of public moneys in excess of the income provided for any one year (Rep Tr. pp. 48-49).

XXVI.

The Court erred in limiting the cross-examination of defendant County of Alameda of the plaintiff's witness, Henry S. Pond, in regard to leases by the United States Government of property along the Tidal Canal, to cross-examination concerning leases of lands lying between the High Street and Park Street bridges (Rep. Tr. 58-61).

XXVII.

That the Court erred in ordering that judgment be entered in favor of plaintiff, The United States of America, on "Findings of Fact and Conclusions of Law" for the reason that said "Findings of Fact and Conclusions of Law" are each and every, all and singular contrary to the law and the evidence in the above entitled case and that, therefore, said decree is erroneous and should be set aside and said final judgment should be reversed and that the said United States Circuit Court of Appeals for the Ninth Circuit should order that judgment be entered for defendant and appellant County of Ala-

meda and that said defendant and appellant County of Alameda should have its costs expended herein.

Dated: February 17, 1941.

RALPH E. HOYT
District Attorney in and for the County of Alameda, State of California.

J. F. COAKLEY
Chief Assistant District Attorney in and for the County of Alameda, State of California.

ROBERT H. McCREARY
Assistant District Attorney in and for the County of Alameda, State of California.

CECIL MOSBACHER
Deputy District Attorney in and for the County of Alameda, State of California
Attorneys for Appellant County of Alameda.

Service and receipt of a copy of the attached Statement of the Points on which Defendant and Appellant County of Alameda Intends to Rely on

E. J. FOULDS
Attorney for Defendants Central Pacific Railway Company and Southern Pacific Company.

RALPH E. HOYT
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[Endorsed]: Filed Feb. 18, 1941. Paul P. O'Brien, Clerk.

No. 9748

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Political Subdivision of the State of California),

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

FILED
MAY - 1 1941
PAUL P. O'BRIEN,
CLERK

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No. 9748

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Political Subdivision of the State of California),

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JURISDICTION

The pleadings in the Southern Division of the United States District Court for the Northern District of California consisted of the Complaint for Declaratory Judgment filed by the Plaintiff The United States of America (Tr. 2-56), under the provisions of section 24 (1) (28 U.S.C.A. § 41 (1)) and section 274 (d) (28 U.S.C.A. § 400) of the Judicial Code, as amended, and the Answer of the Defen-

dant County of Alameda (Tr. 67-125), and of the Defendants Central Pacific Railway Company and Southern Pacific Company (Tr. 56-66).

This appeal from the Southern Division of the United States District Court for the Northern District of California, to the United States Circuit Court of Appeals for the Ninth Circuit is taken under the authority of section 128 of the Judicial Code, as amended (28 U.S.C.A. § 225) and in accordance with the provisions of Rule 73 (SCUS).

STATEMENT OF THE CASE

This is an appeal from a judgment rendered by the Southern Division of the United States for the Northern District of California in favor of the United States and against the County of Alameda in an action whereby the Government sought a declaratory judgment to determine the validity of an alleged contract made and entered into by and between the parties thereto and for a decree of specific performance to compel the County of Alameda to forever spend its public moneys to perpetually operate, maintain, repair and rebuild the Fruitvale Avenue Bridge for the free and continuous use and benefit of a private railroad company. Said bridge is a combination vehicular, railroad and pedestrian bridge built and owned by the United States and resting upon and crossing the property of the Government.

The alleged contract was evidenced by the resolution of the board of supervisors of Alameda County adopted December 6, 1909 (Appendix p. xl), a license dated Sep-

tember 3, 1910 issued by the Secretary of War and revocable at will, for the County of Alameda to assume control of the High Street, Park Street and Fruitvale Avenue Bridges (Appendix p. xlii), and the resolution adopted by the board of supervisors of said county on November 10, 1913 (Appendix p. xliv). The County of Alameda contended that the said alleged contract was *ultra vires* and void for a number of reasons hereinafter discussed and that the said county never had been, and is not now estopped to deny the validity of the same.

On October 21, 1940 the United States District Court made and entered its decree wherein it ordered, adjudged and decreed that the County of Alameda and the United States entered into a valid, binding contract under which the said county became obligated to operate, maintain, repair and rebuild the Fruitvale Avenue Bridge at its sole cost and expense and that the United States and the private railroad companies were relieved of all liability in respect thereto, and that the County of Alameda is now estopped to deny or question the validity of said contract (Appendix p. xxii).

Thereafter the County of Alameda perfected its appeal to the United States Circuit Court of Appeals for the Ninth Circuit under Rule 73.

QUESTIONS INVOLVED

I.

Does the County of Alameda or its board of supervisors now have, or has it ever had authority to operate, maintain, repair or rebuild said Fruitvale Avenue Bridge?

II.

Did not the contract between the County of Alameda and the United States violate section 18 of article XI of the Constitution of the State of California forbidding a county to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year?

III.

Are not the expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge gifts of public money to a private corporation or to the United States, prohibited by section 31, article IV, of the California Constitution and the "due process" clause of the United States Constitution?

IV.

Is not the alleged contract between the United States and the County of Alameda *ultra vires* and void because it is an attempt to forever bind said county to perform the obligations set forth therein and/or was not said alleged contract terminated after a reasonable time, to wit, twenty-seven years, and/or was not said alleged contract terminable at the will of either party?

V.

Has Congress now, or has it ever had power to authorize the County of Alameda to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge?

VI.

Is the County of Alameda now, or has it ever been estopped to set aside the alleged contract which was *ultra vires* and void?

VII.

Is not the alleged contract between the United States and the County of Alameda void for lack of mutuality?

VIII.

Is not the alleged contract between the United States and the County of Alameda void for uncertainty?

IX.

Was not the United States District Court bound by the interpretation of the constitutional and statutory provisions and by the case law of the State of California as set forth by the District Court of Appeal of that state in the case of *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 P. (2d) 460?

X.

Will equity decree specific performance of an alleged contract which is oppressive, unjust and unconscionable?

XI.

Should not the counterclaim of the County of Alameda have been allowed and the said county have its costs expended in this action?

XII.

Did not the District Court of the United States err in finding that the Tidal Canal was not open to navigation and that on June 3, 1913 the United States opened said canal to navigation, and in refusing to admit in evidence the testimony of Major Mendell given in the case of *United States* v. *Crooks, et al.?*

XIII.

Did not the District Court of the United States also err in not further finding the following facts:

1. That the harbor lines were revocable at will by the Secretary of War and were in fact revoked by him in 1929;

2. That the permission given to adjacent property owners to occupy the strip along the canal for the construction

of wharves and warehouses was without special lease of any kind and was expressly revocable by the Government;

3. That in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 P. (2d) 460, the District Court of Appeal had before it the resolution of the board of supervisors of the County of Alameda of November 10, 1913, which incorporated the resolution of said board of December 6, 1909; and

4. That the United States was notified by the District Attorney of the County of Alameda, as counsel for the County of Alameda, of the filing of the "Petition for Writ of Mandate" in said action and that copies of all papers filed in said action by both petitioner and respondent, including the stipulation of facts and all briefs, were sent to and received by the United States Attorney in San Francisco during the proceedings and before the case was submitted?

XIV.

Did not the District Court of the United States err in ordering that judgment be entered in favor of the United States on "Findings of Fact and Conclusions of Law" and particularly on the conclusion of law contained in paragraph I of "Conclusions of Law" which reads "That the County of Alameda and the United States entered into a valid, binding contract as evidenced by the resolution adopted by the board of supervisors of said county on December 6, 1909; by the license issued by the Secretary of War on September 3, 1910; and the resolution adopted by the board of supervisors of said county on November 10, 1913" and the conclusion of law contained in paragraph II of "Conclusions of Law" which reads "That under said contract the said County of Alameda was obligated to maintain, operate, repair and rebuild said Fruitvale Avenue Bridge"?

SPECIFICATION OF ERRORS

The following is the specification of errors relied upon by the appellant County of Alameda in this appeal:

I.

The conclusion of law contained in paragraph IV of "Conclusions of Law" that "The County of Alameda had and has authority to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge" is erroneous and the court should have concluded as a matter of law that neither the County of Alameda nor its board of supervisors now has or ever has had the authority to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge (Appendix p. xxxi).

II.

The conclusion of law contained in paragraph VII of "Conclusions of Law" that "The contract between the County of Alameda and the United States does not violate section 18 of article XI of the Constitution of California forbidding a county to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year" is erroneous and the court should have concluded as a matter of law that the alleged contract between the County of Alameda and the United States violated said section of the Constitution (Appendix p. xxxiii).

III.

That the conclusion of law contained in paragraph VI of "Conclusions of Law" that "The expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge were and are not gifts to a private corporation of public money prohibited by section 31 of article IV of the California Constitution" is erroneous and the court should have concluded as a matter of law that the expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge are and always have been gifts of public money or things of value to individuals and municipal or other corporations, prohibited

by section 31 of article IV of the Constitution of the State of California and violative of the Fourteenth Amendment of the Constitution of the United States (Appendix p. xxxii).

IV.

The court erred in not concluding as a matter of law that the alleged contract between the United States and the County of Alameda, not specifying any time for which said county was bound to operate, maintain, repair and if necessary rebuild the Fruitvale Avenue Bridge, was contrary to public policy and void and/or was substantially complied with after a reasonable time and/or was terminable at the will of either party (Appendix p. xxxvi).

V.

The conclusion of law contained in paragraph V of "Conclusions of Law" that "Congress had and has power to authorize the county to operate, maintain, repair and rebuild the Fruitvale Avenue Bridge" is erroneous and the court should have concluded as a matter of law that the Congress of the United States has not now, and never has had the power to authorize said County of Alameda to operate, maintain, repair or rebuild said Fruitvale Avenue Bridge (Appendix p. xxxii).

VI.

The conclusion of law contained in paragraph III of "Conclusions of Law" that "The County of Alameda is now estopped to set aside its contract with the United States to maintain, operate, repair and rebuild Fruitvale Avenue Bridge" is erroneous and the court should have concluded as a matter of law that the alleged contract was *ultra vires* and that the said County of Alameda is not now and never has been estopped to set aside said alleged contract (Appendix p. xxxi).

VII.

The conclusion of law contained in paragraph VIII of

"Conclusions of Law" that "The contract between the United States and the County of Alameda is not void for lack of mutuality" is erroneous and the court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda was void for lack of mutuality (Appendix p. xxxiii).

VIII.

The conclusion of law contained in paragraph IX of "Conclusions of Law" that "The contract between the United States and the County of Alameda is not void for uncertainty" is erroneous and the court should have concluded as a matter of law that the alleged contract was void for uncertainty and should have refused specific performance of the same (Appendix p. xxxiv).

IX.

The conclusion of law contained in paragraph X of "Conclusions of Law" that "The courts of the State of California had no jurisdiction to determine substantial rights of the United States in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 P. (2d) 460" is erroneous and the court should have concluded as a matter of law that the decision of the District Court of Appeal of the State of California in the matter of *County of Alameda* v. *Ross, supra,* interpreting the statutes, constitutional provisions and case law of said state in regard to the powers of the board of supervisors and counties of said state, was binding upon the United States District Court in the present action and that said court was without authority to interpret said statutes, constitutional provisions and substantive law contray thereto (Appendix p. xxxiv).

X.

The court erred in not concluding as a matter of law that equity will not decree specific performance of an alleged contract which is oppressive, unjust and unconscionable (Appendix p. xxxvi).

XI.

The conclusion of law contained in paragraph XII of "Conclusions of Law" which reads "That the counter claim of the defendant County of Alameda be dismissed and said defendant county take nothing thereby" is erroneous and the court should have concluded as a matter of law that the counter claim of the defendant County of Alameda be allowed and that the said county have its costs expended in this proceeding (Appendix p. xxxv).

XII.

The fact set forth in paragraph V of the Findings of Fact which read: "The Tidal Canal was not open to navigation" (Tr. 252) is erroneous and the court should have found in lieu thereof that the Tidal Canal was navigable in fact (Appendix p. xxv).

XIII.

The fact set forth in paragraph XI of the Findings of Fact which read: "On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made available to adjacent property owners a twenty-five foot strip of property along each side of the Canal for the construction of wharves and warehouses" (Tr. 263) is erroneous and the court should have found in lieu thereof that prior to June 3, 1913 the Tidal Canal was open to navigation (Appendix p. xxvi).

XIV.

The court erred in refusing to admit in evidence the testimony of the witness, Major G. H. Mendell, given in the case of *United States* v. *Crooks et al.* Over the objection of appellant that the report of 1874 was irrelevant and immaterial and should not be admitted unless the testimony of Mendell in the *Crooks* case was likewise admitted (Tr. 335, 337-339) the district court admitted said report in evidence (Tr. 350) and rejected appellant's offer of said testimony (Tr. 202-203), the substance of said testimony

being that it was intended that the Tidal Canal would be navigable (Appendix p. xxxvi; Tr. 180-196, 338, 342).

XV.

The court erred in refusing to admit evidence of the fact that the said Major Mendell was deceased prior to the commencement of the proceeding now before this court and during his lifetime was the same party named as defendant in *United States* v. *Crooks et al* (Appendix p. xxxvii; Tr. 198-199).

XVI.

The court erred in not finding the following facts:

1. That the harbor lines were revocable at will by the Secretary of War and were in fact revoked by him in 1929 (Tr. 134-135, 170-172, 238, 446);

2. That the permission given to adjacent property owners to occupy the strip along the canal for the construction of wharves and warehouses was without special lease of any kind and was expressly revocable by the Government (Tr. 238-239, 379);

3. That in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 P. (2d) 460, the District Court of Appeal had before it the resolution of the board of supervisors of the County of Alameda of November 10, 1913, which incorporated the resolution of said board of December 6, 1909 (Tr. 239); and

4. That the United States was notified by the District Attorney of the County of Alameda, as counsel for the County of Alameda, of the filing of the "Petition for Writ of Mandate" in said action and that copies of all papers filed in said action by both petitioner and respondent, including the stipulation of facts and all briefs, were sent to and received by the United States Attorney in San Francisco during the proceedings and before the case was submitted (Tr. 142, 239-240).

XVII.

The court erred in ordering judgment to be entered in favor of the United States on "Findings of Fact and Conclusions of Law" and particularly on the conclusion of law contained in paragraph I of "Conclusions of Law" which reads "That the County of Alameda and the United States entered into a valid, binding contract as evidenced by the resolution adopted by the board of supervisors of said county on December 6, 1909; by the license issued by the Secretary of War on September 3, 1910; and the resolution adopted by the board of supervisors of said county on November 10, 1913" and the conclusions of law contained in paragraph II of "Conclusions of Law" which reads "That under said contract the said County of Alameda was obligated to maintain, operate, repair and rebuild said Fruitvale Avenue Bridge."

STATEMENT OF FACTS.

The appellant is the County of Alameda, a political subdivision of the State of California, and the appellee is the United States. The Central Pacific Railway Company, the successor to the Central Pacific Railroad Company, and its lessee the Southern Pacific Company are private railroad corporations (Tr. 127, 246, 247) owning a railroad right of way over the Fruitvale Avenue Bridge.

The cities of Alameda and Oakland are both located in the County of Alameda on the east shore of San Francisco Bay, a navigable body of water. Said cities are separated from one another by a navigable Tidal Canal approximately two miles in length, three hundred and fifty feet in width, and connecting an inner harbor with San Leandro Bay, both the latter being navigable and connected with San Francisco Bay (Tr. 127-128, 247-248).

In 1874 Congress appropriated $100,000 for the improvement of Oakland Harbor (Tr. 129, 249) and in 1876 the United States instituted a condemnation proceeding in

what is now the Superior Court of California in the County of Alameda, herein referred to as *United States* v. *Crooks, et al.,* to acquire a right of way for the Tidal Canal, and sought to condemn rights of the County of Alameda in highways and of the Central Pacific Railroad Company in railroad rights of way which crossed the proposed Tidal Canal where the bridges are now located (Tr. 129-130, 249). These defendants asked for no damages and the decree ordered the United States at its own expense to construct and keep in repair suitable bridges and railroad bridges on the highways and railroads crossing the proposed canal (Tr. 130-131, 160, 165, 250).

The United States completed the construction of the Tidal Canal in 1903 to an average depth of from eight to ten feet (Tr. 132, 250, 251) to turn the water from San Leandro Bay through a tidal canal into an estuary, so as to increase the tidal canal flow through said estuary, for the purpose of removing the sediment from the same and affording a deeper entance to said San Leandro Bay through the estuary and the Canal, all in the interest of commerce and navigation on the east side of San Francisco Bay (Tr. 129, 248). The appellant contends that the Canal was intended to be and was navigable both in fact and in law for many years prior to 1913.

The United States constructed and until November 17, 1913 maintained and operated highway drawbridges at Park and High Streets, with a clearance below of thirteen feet three inches, and a combination railroad, vehicular and pedestrian drawbridge at Fruitvale Avenue with a clearance below of twelve feet eight inches. For many years prior to 1913 barges and scows plied up and down said Tidal Canal and the bridges were opened and closed on occasions with hand operated machinery by the United States as well as by private interests to permit passage of vessels which could not clear the bridges (Tr. 131-132,

251-252). Prior to 1913 it took approximately thirty minutes to open and thirty minutes to close each of said bridges. After electrification it took two to three minutes to open and the same to close each bridge (Tr. 132, 251).

In 1910 a harbor line survey was made for San Francisco Bay area by the United States. A survey made prior to 1876 in connection with the condemnation action of *United States* v. *Crooks, et al.,* was used in the preparation of the map of the harbor lines of the Tidal Canal (Tr. 379, 391, 404, 417, 418). The area between pierhead and bulkhead lines was made available for use by adjoining property owners at the pleasure of the United States and without special lease of any kind (Tr. 379). The harbor lines were revocable at will and were in fact revoked by the Secretary of War in 1929 by moving the pierhead lines back to the bulkhead lines (Tr. 446).

On December 6, 1909 the board of supervisors of the County of Alameda adopted a resolution proposing that if the United States Government wuld turn over these bridges to the County, said county would accept the same and assume all costs of their future repair, operation and replacement, provided that each of them should be equipped to be operated by electricity and that the United States should under such terms and conditions as it saw fit, lease the water front in the Tidal Canal and establish harbor lines to permit the construction of wharves and docks (Appendix p. xl; Tr. 134, 167, 253).

On September 3, 1910, allegedly acting under a Congressional Act, the Secretary of War issued a revocable license to the county to assume the control, maintenance, repair and the rebuilding of said bridges, the United States to install the electrical equipment (Appendix p. xlii; Tr. 134, 170, 256).

On November 10, 1913 said board of supervisors adopted a resolution accepting said revocable license (Appendix dix p. xliv; Tr. 134, 167, 253).

The electrical equipment was later installed by the United States at a total cost of $21,358.80 (Tr. 135, 263).

Thereafter the bridges were operated, maintained and repaired by the county at a cost of $703,066.45 (Tr. 136, 137, 264). The cost to the county of operating, maintaining and repairing the Fruitvale Avenue Bridge is approximately $1,000 per month and the estimated cost of rebuilding this bridge is $1,250,000 (Tr. 136, 137, 264-265). The total cost thus expended has exceeded the income and revenues provided for the fiscal year 1913-14 or any fiscal year prior thereto (Tr. 137, 265).

The tracks and right of way of the Central Pacific Railway Company and its lessee, the Southern Pacific Company, are and were at all times permanent, integral and inseparable parts of the Fruitvale Avenue Bridge which is constantly used by said private railroad corporations free of cost for the transit of railroad traffic (Tr. 138, 266).

Between the years 1890-1930 the population of Alameda County increased in excess of five-fold; between the years 1880-1930 the population of the City of Alameda increased in excess of six-fold and the population of the City of Oakland increased in excess of eight-fold (Tr. 139, 140, 267, 268). The Fruitvale Avenue Bridge carries the only railroad traffic to and from the City of Alameda wherein the United States Naval Base is now located.

County of Alameda v. *Ross,* 32 Cal. App. (2d) 135, 89 P. (2d) 460, was a mandamus proceeding brought by the County of Alameda against its auditor to determine the validity of the alleged constract between the United States and the County of Alameda. The court held that the alleged license agreement was *ultra vires* and void (Tr. 141, 269). Thereafter the county notified the United States that it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda* v. *Ross,* (Tr. 140, 176, 268). The private railroad corporations

served notice on the United States requesting that it comply with the decree in the *Crooks* case and cause the Fruitvale Avenue Bridge to be inspected, maintained and renewed (Tr. 141, 178, 268). Immediately thereafter the United States Governmment instituted these proceedings in the United States District Court for the Northern District of California, Southern Division.

ARGUMENT OF THE CASE.

I.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH IV OF "CONCLUSIONS OF LAW" THAT "THE COUNTY OF ALAMEDA HAD AND HAS AUTHORITY TO OPERATE, MAINTAIN, REPAIR OR REBUILD THE FRUITVALE AVENUE BRIDGE" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT NEITHER THE COUNTY OF ALAMEDA NOR ITS BOARD OF SUPERVISORS NOW HAS OR EVER HAS HAD THE AUTHORITY TO OPERATE, MAINTAIN, REPAIR OR REBUILD THE SAID FRUITVALE AVENUE BRIDGE (APPENDIX p. xxxi).

There was not and is not now any constitutional, statutory, charter or any other authorization whatever, either express or implied, authorizing the board of supervisors to bind the County of Alameda to forever ". . . maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve. . .", said alleged license agreement being expressly revocable at the will of the Secertary of War (Tr. 172, 174, 134, 135).

Furthermore the Fruitvale Avenue Bridge as well as the land beneath it and on which it rests has at all times been, and now is the property of the United States.

Pursuant to the authorities hereinafter set forth, said alleged license agreement was, and is *ultra vires* and void, and the following California authorities alone are conclusive of this issue.

A county is a body corporate and politic and as such has only the powers specified by statute except such other powers as are necessarily implied from those expressed.

Cal. Pol. Code § 4000;

Simpson v. *Payne,* 79 Cal. App. 780, 785, 251 Pac. 324, 326.

These powers can be exercised only by the board of supervisors or by agents and officers acting under their authority.

Cal. Pol. Code § 4001;

Contra Costa County v. *Soto,* 138 Cal. 57, 70 Pac. 1019.

Boards of supervisors are creatures of statute and the authority for any act on their part must be sought in statutes. Any action of a board of supervisors which is not within the scope of its powers, either express or implied, is illegal, *ultra vires* and of no effect.

In *County of Modoc* v. *Spencer,* 103 Cal. 498, 37 Pac. 483, the Supreme Court of the State of California held that under the County Government Act, boards of supervisors had no power to employ counsel to prosecute criminal cases and such employment, being without authority, was void and created no legal claim against the county.

In *Sutro* v. *Pettit,* 74 Cal. 332, 16 Pac. 7, the Supreme Court held that county bonds issued under an act authorizing their issuance not exceeding a stated amount were void in so far as they exceeded such amount, even in the hands of a bona fide purchaser for value and before maturity. The court pointed out that having been issued without authority, the bonds were void.

In 18 California Jurisprudence, page 798, it is said:

"The rule is so familiar as to be trite that a municipal corporation can exercise only such powers as have been conferred upon it in its charter, some constitutional provision or general law; . . ."

The California decisions support this well established

doctrine as seen in *Frisbee* v. *O'Connor,* 119 Cal. App. 601, 603, 7 P. (2d) 316, 317, wherein the court stated:

". . . The well-settled rule by which the powers of a municipal corporation are to be measured is stated in 1 Dillon on Municipal Corporations, fifth edition, Section 237, as follows: 'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void.' Approval of this rule is found in a long line of decisions in this state. (*Miller* v. *City of Los Angeles,* 185 Cal. 440 [197 Pac. 342]). . ." (and other California Supreme Court citations).

In the decision of *In Re City and County of San Francisco* v. *Boyle,* 195 Cal. 426, 434, 233 Pac. 965, 968, the State Supreme Court said:

". . . But as this court has already said in the Egan case, 'However worthy the motive, however advantageous to the public the result sought to be attained, it must always be remembered that municipal corporations are public bodies of limited powers; and that the validity of their acts must be judged by an examination of the charter or law defining their powers rather than by a view of the purposes or results of those acts.' . . ." [1]

1. Accord: *Hurst* v. *City of Burlingame,* 207 Cal. 134, 138, 277 Pac. 308, 310; and *Fessler* v. *Campbell,* 2 Cal. (2d) 638, 644, 42 P. (2d) 1020, 1022.

The principles of law hereinbefore discussed are also similarly well established throughout the United States.

In 20 Corpus Juris Secundum, *Counties,* § 174, pages 1006-1007, it is stated:

> "A county is not bound by a contract beyond the scope of its powers or foreign to its purposes, or which is outside the authority of the officers making it. In this connection it is the rule that the authority of a county board to make contracts is strictly limited to that conferred, either expressly or impliedly, by statute, regardless of benefit to the county or of value received; . . ." [2]

In 20 Corpus Juris Secundum, *Counties,* § 82, pages 849-851, it is said:

> "It is well settled that a county board possesses and can exercise such powers, and such powers only, as are expressly conferred on it by the constitution or statutes of the state, or such powers as arise by necessary implication from those expressly granted . . ." [3]

The same principles apply to cities.

43 Corpus Juris, *Municipal Corporations,* § 185, pp. 186-188;

1 McQuillin, *Municipal Corporations,* (2d Ed.), § 367, pp. 1003-1016; and

3 McQuillin, *Municipal Corporations,* (2d Ed.), § 1269, pp. 804-805.

We shall now discuss California decisions that definitely apply the foregoing principles of law to facts that are analogous to the issue now before this court.

In *Glass* v. *Ashbury,* 49 Cal. 571, 577, a state legislative act authorized the board of supervisors of the City and County of San Francisco to procure a training ship to instruct boys in seamanship, and to apply to the United States for the use of a vessel, and to accept the services of any officer whom the United States might detail to service

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2. (See also 15 Corpus Juris, *Counties,* § 233, pp. 540-541.)
3. (See also 15 Corpus Juris, *Counties,* § 103 p. 457.)

on the vessel upon such terms and conditions, consistent with the provisions of the Act, as the United States might prescribe. The board was also authorized to remove boys from the Industrial School to the ship, and designated courts could sentence or transfer boys to the ship. A Congressional Act authorized the Secretary of the Navy to furnish such a training ship provided "that no person shall be sentenced to or received at such schools as a punishment or commutation of punishment for crime". The ship and the services of a lieutenant-commander of the United States Navy were accepted, his bill for one month was allowed by the board of supervisors and the auditor refused to audit the same. In denying the application for a writ of mandate to compel the auditor to audit said bill, the Supreme Court of the State of California said:

> "It certainly requires no argument to show that the condition imposed by the Government of the United States, as found in the proviso, is utterly inconsistent with the provisions of the Act of the Legislature under which the Board is to act in accepting the ship. The provisions found in the Act of the Legislature cannot be enforced, except through a palpable disregard and violation of the terms of the proviso found in the Act of Congress. The former expressly authorizes the confinement on board the training ship of a certain class of offenders against the criminal laws of the State as a punishment or commutation of punishment for crimes of which they are or may be convicted, while, as we have seen, the latter expressly and in terms, prohibits it.
>
> "It would indeed be difficult to imagine a more palpable or irreconcilable inconsistency between the provisions of the Act of the Legislature and that of Congress than is here pointed out, and it results that until some change shall be effected in the provisions of one or the other of these acts, the Board can have no authority to accept the proffered training ship."

As in the foregoing case, "the Board can have no au-

thority to accept the" alleged license agreement now before this court, in that there is no authorization for such an agreement to be found in the state constitution, statutes or county charter, either expressed or implied.

In *Pacific Bridge Co.* v. *Kirkham,* 54 Cal. 558, 560, a state legislative act authorized the City of Oakland to construct a bridge across the estuary and levy assessments therefor. The act did not authorize the city to construct the bridge on private land. This was an action brought to enforce an assessment lien against defendant's land. The defense was made that the bridge in part rested on and passed over land which was private property, the right of way over which had never been granted to the City of Oakland. The Supreme Court of the State of California said:

> ". . . If this be true, it must be conceded, we think, on all sides, that the assessment cannot be enforced; for no one can be compelled to pay for an improvement of this nature which has been erected upon private property. The principle upon which such assessments are sustained is, that those required to pay will be benefited by the improvement and will have the use and enjoyment of it. But this benefit could not accrue if the improvement is erected on private property. In such case neither the public nor those assessed would be entitled to its use, and it might be abated at any time by the owner of the property . . ."

In the case now at issue, the board of supervisors was not authorized to agree to use county tax moneys to repair or rebuild the Fruitvale Avenue Bridge which was, and now is the property of the United States and which said bridge rests on land belonging to the United States. In accord with the foregoing case, the principle upon which tax moneys are expended for a public improvement is that those required to pay the same will be benefited by, and will have the use and enjoyment of the improvement. But

in this case the benefit might never accrue, as both the bridge and the land upon which it is located belong to the United States. In addition, the alleged license agreement was, and is revocable at the pleasure of the United States. Hence, as in the foregoing case, under such facts both the public and the taxpayers paying the bills could at any time be deprived of the benefit of such expenditures including the estimated cost of $1,250,000 for the replacement of this bridge. As was stated by the court in *Alameda County* v. *Ross,* 32 Cal. App. (2d) 135, 141, 89 P. (2d) 460, 462, 463:

> ". . . It is apparent from the terms of the license that the County of Alameda will soon be called upon to reconstruct the Fruitvale Avenue Bridge at an expense of approximately $1,250,000, immediately upon the completion of which the government may revoke the agreement, appropriate the benefits of the vast expenditure of money by the county, and resume its exclusive operation and control of the bridges. . ."

The foregoing decisions of the California courts compel the conclusion that such an alleged license agreement was *ultra vires* and void as being completely without the powers, either express or implied, of the board of supervisors and the County of Alameda.

Pursuant to the foregoing well-established principles of law, the court held the *alleged license agreement involved in the action now before this court to be invalid and void* in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 146, 147, 89 P. (2d) 460, 465 (petition for hearing denied by the Supreme Court of the State of California). In said decision, among other things, the court said in this connection:

> "The County of Alameda is a body corporate and politic, possessing only such powers as are specifically granted to it by law, together with such other powers as may be necessarily implied therefrom. (Sec. 4000,

Pol. Code.) Any person contracting with a county or municipal corporation is bound to recognize such limitations of powers. (*Hurst* v. *City of Burlingame,* 207 Cal. 134, [277 Pac. 308]; *City and County of San Francisco* v. *Boyle,* 195 Cal. 426 [233 Pac. 965]; *Ellis Landing & Dock Co.* v. *City of Richmond,* 70 Cal. App. 702 [234 Pac. 336]; *Frisbie* v. *O'Connor,* 119 Cal. App. 601 [7 Pac. (2d) 316]; 18 Cal. Jur. 797, sec. 105; 1 McQuillin's Municipal Corp., 2d ed., p. 909, sec. 367.) Boards of supervisors are merely the agents of the county. (Sec. 4001, Pol. Code; *Contra Costa County* v. *Soto,* 138 Cal. 57 [70 Pac. 1019]; *County of Modoc* v. *Spencer,* 103 Cal. 498 [37 Pac. 483].) The powers of a board of supervisors with respect to incurring municipal indebtedness should be determined by a strict construction of the law. (*Hurst* v. *City of Burlingame,* supra; *Egan* v. *San Francisco,* 165 Cal. 576 [133 Pac. 294, Ann. Cas. 1915A, 754].) Quoting with approval from *Linden* v. *Case,* 46 Cal. 171, it is said in *County of Modoc* v. *Spencer,* supra, at page 502:

" 'It is settled in this state that no order made by a board of supervisors is valid or binding unless it is authorized by law. No claim against a county can be allowed, unless it be legally chargeable to the county; and if claims not legally chargeable to the county are allowed, neither the allowance nor the warrants drawn therefor create any legal liability'.

"Section 4005 of the Political Code provides that:

" 'All contracts, authorization, allowances, payments, and liabilities to pay, made or attempted to be made in violation of law, shall be absolutely void, and shall never be the foundation or basis of a claim against the treasury of such county. And all officers of said county are charged with notice of the condition of the treasury of said county, and the extent of the claims against the same.' "

Decisions throughout the United States are in accord with the well established law in California in this regard.

In *Minneapolis, St. P., R. & D. Electric Traction Co.* v. *City of Minneapolis,* 124 Minn. 351, 353, 354, 355, 145 N. W. 609, the Supreme Court of the State of Minnesota held that the city had no power to contract with a commercial railroad to bear part of the expense of strengthening a bridge which the railroad company desired to cross with its tracks where the bridge was already of sufficient strength to accommodate general travel. The court further held that a contract by which a municipality undertakes to assume an obligation properly resting on a railroad company to restore a road or street, to build a bridge or to maintain a bridge is wholly beyond the power of the city and such a contract is void.[4]

Similarly, the County of Alameda had no power to agree with the United States to bear all the expense of operating, maintaining, repairing and when necessary rebuilding the Fruitvale Avenue Bridge which is used for the transit of railroad traffic. (Tr. 138). Such an agreement undertook to assume an obligation ordinarily resting on a private railroad corporation, but here resting on the United States pursuant to the provisions of the condemnation decree in the action entitled *The United States* v. *Crooks, et al.,* (Tr. 131).

In *Jefferson County Fiscal Court* v. *Jefferson County,* 278 Ky. 785, 789, 790, 792, 129 S.W. (2d) 554, 556, 557, a county appealed from an order of a fiscal court appropriating county money to be expended to provide fire protection under a city contract for certain property partly owned by the county and partly owned by separate governmental agencies. The court stated that the petition was also in the nature of a petition in equity for a declaration of rights of the parties. The Supreme Court of the State of Kentucky quoted with approval from the trial court:

4. Accord: *City of Bloomington* v. *Chicago & A. R. Co.,* 134 Ill. 451, 457, 458, 26 N. E. 366, 367; and *State* v. *Minnesota Transfer Ry. Co.,* 80 Minn. 108, 115, 118, 83 N. W. 32, 35, 36.

"The contract is indivisible. It is impossible to allocate a portion, or percentage, of the gross fee of $7,500.00 to protection of County-owned buildings, and the balance to protection of buildings owned by the separate instrumentalities . . .

"Examining the question whether the County possesses power to provide such protection for the properties of the independent instrumentalities, it is to be observed that the Legislature has conferred power, express and implied, upon those separate corporate entities to acquire, hold, maintain and repair the properties owned by them. . . . The existence of this power in them would seem to militate against finding that the delegation of power has been duplicated by a like grant —by implication—to the County.

"It is my opinion that neither by expression nor necessary implication has the Legislature delegated power to the County to contract for fire protection services to be rendered with respect to the buildings owned and maintained by the independent governmental agencies as distinguished from those owned by the County itself . . .

". . .

". . . It is not being competent for the fiscal court to appropriate public monies for that purpose and the contract being indivisible, the order appealed from and the contract executed pursuant thereto are void."[5]

In the appeal before this court the alleged license agreement between the United States and the County of Alameda is also indivisible. It would be impossible to allocate a portion or percentage of the cost of operating, maintaining, repairing and when necessary rebuilding the Fruitvale Avenue Bridge to the County of Alameda for the vehicular and pedestrian use of this bridge and the balance to either the United States or the private railroad corporation for

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5. Accord: *City of Bay St. Louis* v. *Board of Sup'rs of Hancock County*, 80 Miss. 364, 32 So. 54; and *Borough of Henderson* v. *County Com'rs. of Sibley Co.*, 28 Minn. 515, 518, 519, 11 N. W. 91, 92, 93.

the use of transit of trains over said bridge, assuming for the sake of argument only that the alleged contract between the United States and the county was not void, illegal and unenforceable on several other grounds and that any portion of said expenditure was a legitimate county charge. This is particularly true by virtue of the fact that said bridge is a combination railroad, vehicular and pedestrian swing span drawbridge, built upon a single concrete center pier, together with the fact that the tracks and right of way of said private railroad corporation are and were at all times permanent, integral and inseparable parts of the Fruitvale Avenue Bridge as constructed. (Tr. 138).

However, whether the contract in the preceding case had been indivisible or not, the result would have been the same, as seen from the language in said case to the effect that neither by expression nor necessary implication had the legislature delegated power to the county to contract for fire protection with respect to buildings owned and maintained by independent governmental agencies, as distinguished from those owned by the county itself.

Likewise in the present case the County of Alameda could not contract with the United States, an independent governmental agency, to forever maintain, operate, repair and whenever necessary replace the Fruitvale Avenue Bridge in the absence of express authorization or necessary implication therefrom, and particularly where said bridge is *owned by the United States and is located on real property belonging to the United States.*

In *Wheeler* v. *City of Sault Ste. Marie,* 164 Mich. 338, 340, 341, 129 N.W. 685, 686, the complainant had conveyed a strip of land for the purpose of the city's widening a street, upon the agreement that the city would move back a building and pay him a certain amount of money. In

holding such contract *ultra vires* the Supreme Court of the State of Michigan said:

> "Another equally cogent reason suggests itself why the city could not legally enter into the proposed contract. By accepting the terms of the contract, it would undertake to carry a casualty risk during the time the building was being moved, and might subject the city to a great loss in the event that the building should collapse. It would likewise compel the city to carry a personal indemnity risk for the employes while engaged in the work. The carrying of casualty and indemnity risks for individuals or other corporations is clearly beyond the power of the defendant city. . ."

Hence clearly the County of Alameda did not have the power to enter into the alleged license agreement whereby it would have assumed the responsibility and burden of a private railroad corporation's continual use of the bridge with not only the greatly increased financial burden, but also the attendant casualty risk.

In *Board of Sup'rs of Apache County* v. *Udall,* 38 Ariz. 497, 506, 507, 508, 509, 1 P. (2d) 343, 347, 348, the county supervisors had attempted to enter into a contract with the United States whereby they were to secure at county expense a right of way over a road to be constructed by the United States and be maintained by it for two years, after which said road was to be maintained indefinitely by the county to the satisfaction of the United States at an estimated cost of $300 per mile. Taxpayers sought to enjoin the county supervisors from taking this action and alleged that the road referred to was not a county road but a federal road project. The Supreme Court of the State of Arizona said:

> "The real question before us is as to the power of a board of supervisors to enter into a contract of the nature described and to expend public funds in furtherance thereof. The only powers possessed by boards of

supervisors are those expressly conferred by statute or necessarily implied therefrom . . . We must then examine the statutes to find what powers boards of supervisors have in connection with matters such as those above set forth."

A statute provided:

". . . The board of supervisors, under such limitations and restrictions as are prescribed by law, may: . . . 4. lay out, maintain, control and manage public roads, ferries and bridges within the county and levy such tax therefor as authorized by law . . ."

The court affirmed the judgment for plaintiffs and said:

". . . It will be observed that the power of the supervisors under this section is confined to 'public roads, ferries and bridges within the county,' and since the power includes the control and management of such roads, we think it but reasonable to assume that the public roads referred to therein must be public county highways, as distinct from state or federal highways, or other public roads, which cannot be controlled or managed by the supervisors . . .

"We conclude, therefore, that boards of supervisors have no right to spend county funds on any road except a county public highway or state route, established as provided in section . . . and then only when such highways are under the exclusive control and management of the supervisors at all times . . ."

The court then stated:

". . . If, on the other hand, the road be a state route, *the supervisors certainly cannot bind themselves to maintain perpetually a road which may be removed from their jurisdiction at any time by the highway commission.*" (Emphasis added.)

It would clearly appear from the foregoing decision that a county not empowered to spend county funds on a federal road is also precluded from spending county funds on a federal bridge.

Pursuant to the foregoing authorities and discussion it

is submitted that there was not, nor is there now any constitutional, statutory or charter provision whatever, whereby the County of Alameda or its board of supervisors was either expressly or impliedly authorized or empowered to enter into, become a party to, or be bound by the alleged license agreement, revocable solely at the pleasure of the United States. Such an alleged license agreement was *ultra vires* and void.

II.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH VII OF "CONCLUSIONS OF LAW" THAT "THE CONTRACT BETWEEN THE COUNTY OF ALAMEDA AND THE UNITED STATES DOES NOT VIOLATE SECTION 18 OF ARTICLE XI OF THE CONSTITUTION OF CALIFORNIA FORBIDDING A COUNTY TO INCUR ANY INDEBTEDNESS OR LIABILITY EXCEEDING IN ANY YEAR THE INCOME AND REVENUE PROVIDED FOR SUCH YEAR" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE ALLEGED CONTRACT BETWEEN THE COUNTY OF ALAMEDA AND THE UNITED STATES VIOLATED SAID SECTION OF THE CONSTITUTION (APPENDIX p. xxxiii).

In so far as pertinent, section 18 of article XI of the constitution of the State of California reads as follows:

> "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose. . ."

Section 4071 of the Political Code of the State of California restates the prohibition contained in the foregoing section of the constitution, and further provides that "Any debts or liabilities contracted in any manner or for any purpose and any allowances made contrary to the provisions of this section shall be null and void and the auditor

shall not draw his warrant therefor nor the treasurer pay the same."

In the early case of *Bradford* v. *San Francisco,* 112 Cal. 537, 545, 44 Pac. 912, 914, the court in construing section 18 of article XI of the constitution said:

> ". . . It is couched in language so plain and explicit as not to be misunderstood or to leave room for judicial interpretation or other inference than that naturally and irresistibly deducible therefrom."

The United States Supreme Court in the case of *District Township of Doon* v. *Cummins,* 142 U. S. 366, 371, 35 L. ed. 1044, 1046, 12 Sup. Ct. 220, 221, in construing a similar section of the Colorado constitution stated:

> "The scope and meaning of this provision of the fundamental and paramount law of the state are clear and unmistakable. No municipal corporations 'shall be allowed' to contract debts beyond the constitutional limit. When that limit has been reached, no debt can be contracted 'in any manner, or for any purpose.' . . ." [6]

The cases uniformly hold that the test to be applied in the determination of whether the debt or liability is in contravention of the constitutional provision, is whether the proposed expenditure, added to all other obligations to which the county had been previously committed, exceeds the income and revenue for the year in which the proposed debt was incurred or the proposed liability assumed.

The Government stipulated and the court found that the total cost of operating, maintaining and repairing the bridges from 1913 to date, namely, the sum of $703,066.45, exceeded the income and revenue provided for the fiscal year 1913-1914 or any fiscal year prior thereto and said expenditure was not assented to by a two-thirds vote of the qualified electors of the County of Alameda voting at

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6. Accord: *Litchfield* v. *Ballou,* 114 U. S. 190, 192, 29 L. ed. 132, 133, 5 Sup. Ct. 820, 821; *Buchanan* v. *Litchfield,* 102 U. S. 278, 287, 26 L. ed. 138, 139; *Mayer* v. *J. T. Jones & Sons,* 113 Okla. 119, 239 Pac. 904, 905; and *Payne* v. *City of Covington,* 276 Ky. 380, 382-390, 123 S.W. (2d) 1045, 1046.

an election held for that purpose (Tr. 137, 264, 265). The sum of $703,000 is only an infinitesimal part of what the total cost of operating, maintaining or repairing said bridge or bridges will be, if this contract binds the County to continue this obligation *ad infinitum,* as the Government contends it does.

It has likewise been stipulated that the cost of replacing the Fruitvale Avenue Bridge was estimated to be approximately one and a quarter million dollars (Tr. 137, 265). One replacement of the bridge would not satisfy the demands of a perpetual contract; yet, since it is stipulated that the sum of $703,000 exceeded the income and revenue for the fiscal year 1913-1914 or any year prior thereto, it must therefore be conceded that the income of any one of said years would have been insufficient to meet the cost of a single replacement.

From these facts it would appear that the alleged agreement between the United States Government and the County of Alameda violated section 18 of article XI of the California constitution and was *ultra vires* and void.

As has heretofore been pointed out in section I of this brief, political subdivisions of the state have only such powers as are expressly conferred upon them by the constitution and statutes of the state. In determining the extent of, or limitation upon such powers, federal courts are bound by the construction of the state constitution and statutes as interpreted by the courts of that particular state (App. Br. 102-107).

In order to understand the decisions of the courts of this state regarding section 18 of article XI of the constitution, it is necessary to discuss and distinguish the early case of *McBean* v. *City of Fresno,* 112 Cal. 159, 167, 44 Pac. 358, 360. The city of Fresno had entered into a contract whereby the plaintiff agreed to dispose of the sewage of the city for a period of five years for the sum of $49,-

000 per year. For three years both parties complied with the contract; in the fourth year the city refused to perform upon the ground that the contract violated section 18 of article XI of the state constitution and was therefore void.

The Supreme Court stated that the intent of the constitutional provision was to protect municipalities of the state from the great and ever growing evil to which they were subjected "by the creation of a debt in one year, which debt was not, and was not expected to be, paid out of the revenues of that year, but was carried on into succeeding years, increasing like a rolling snowball as it went, until the burden of it became almost unbearable upon the taxpayers". However, the court was so impressed by the health problem of properly disposing of the sewage of the city that it finally concluded that the contract under consideration did not violate section 18 of article XI of the constitution and rationalized its decision by saying:

> ". . . When it is come to consider the contractual relations between the city and appellant, it is at once seen that the city cannot be liable in any one year for more than four thousand nine hundred dollars, an amount far within the revenue derived to the sewer fund; and, further, that it cannot become liable for this amount at all until faithful service rendered by the contractor each year . . .
>
> ". . . We base our views upon the conviction that, at the time of entering into the contract, no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed."

The courts of California and other states have recognized the fact that the decision of the *McBean* case was the result of an attempt to do equity and to protect the health of the city and have limited the application of the rule there enunciated to similar situations.

The Supreme Court of Idaho in the case of *Boise Development Co.* v. *City of Boise,* 26 Idaho 347, 361, 143 Pac. 531, 535, in referring to the *McBean* case stated:

> ". . . This was a case where the court, no doubt, had strong equitable grounds in favor of the validity of the contract upon which the action was based. . . . there was an urgent necessity for the city to make some arrangements to dispose of its sewage at once. The quarterly expense was small, and the price was probably very reasonable. Moreover, the charter of the city authorized the levying and collection of a tax not exceeding 10 cents on each $100 for a sewer fund, and it was conceded that the tax which would be collected for that fund was ample to meet all sums that might be needed to pay McBean under said contract. Because of the merit of the contract and the pressing necessity for some means to take care of the sewage of the city, we believe the better judgment of the court was somewhat biased by its desire to actually benefit the people of the city. In fact, as a matter of public policy, the execution of this contract might well be justified. But when the court attempts by argument to escape the force and effect of the constitutional provision under consideration and show that the city incurred no *liability* under the contract, we submit that its reasoning is not sound. . . ."

The California courts in refusing to enlarge the doctrine of the *McBean* case have clearly distinguished the cases where the liability is not created at the time of the execution of the agreement but comes into being each year as the services are rendered or the materials furnished, as in that case, and the cases where the consideration on the other side is fully furnished at the time of the transaction and the debt is created at once, the time of payment only being postponed.

If the theory of the appellee is correct that the electrification of the bridges, the establishment of the harbor lines

and making available for use the abutting land was the consideration for the execution of the alleged agreement, then the instant case clearly falls within the latter category, otherwise the appellee is driven to the position of conceding that the revocable license to control the bridges was the consideration for the alleged agreement and that therefore the agreement failed for lack of mutuality. Conceding for the sake of argument only that the appellant's theory of what constituted the consideration for the execution of the agreement is correct, then the agreement violated section 18 of article XI of the constitution as interpreted by the California courts and was therefore void.

In the case of *Chester* v. *Carmichael,* 187 Cal. 287, 290, 291, 292, 293, 294, 201 Pac. 925, 926, 927, 928 the grantors deeded to the city of Sacramento lands for park purposes subject to certain conditions subsequent to the effect that the city must expend $5,000 annually in the improvement of the park, the total cost of such improvement to be about $50,000. The plaintiff, a taxpayer, sought an injunction prohibiting the city of Sacramento and its officers from carrying out the provisions of the deed and to have such deed declared void on the theory that such action on the part of the city would be in violation of section 18 of article XI of the constitution.

The following language of the court interpreting this section of the constitution is directly in point in the instant case:

> ". . . The obligation created by the contract is one in favor and for the benefit of the grantors, who have fully executed their part by the conveyance and delivery of the property, . . . By means of conditions subsequent expressed in the deed, the property conveyed was practically pledged to the grantors as security for the performance of the undertaking, the title to revert to them, their successors or assigns, in the event of nonperformance, if they so elect. It may

be assumed that the city cannot be held liable in damages for failure to carry out this contract, or specifically compelled to perform, and that the only penalty for failure to perform is the reversion of the property to the grantors, their successors or assigns. This being the situation, the question is whether the transaction, the giving and acceptance by the city of the deed, involved the incurring by the city of 'any indebtedness or liability in any manner or for any purpose' . . . within the meaning of section 18 of article XI of our constitution. If it did, admittedly, in the light of the facts alleged in the complaint, the liability exceeded the income and revenue provided for the year 1919, the year in which the transaction was had.

"Assuming the validity of the transaction between the parties apart from any question as to the effect of the constitutional provision, it seems clear that an obligation was imposed thereby upon the city, in favor of the grantors, their successors and assigns, to expend in the specified work at least five thousand dollars per annum for a period of years and until the completion thereof. To this extent the income and revenue of future years was attempted to be appropriated for the performance of this obligation in favor of the grantors, an obligation assumed by the city in consideration of the transfer to it of the property. Assuming the complete carrying out of its part of the agreement by the city, there will have been such an appropriation. The doing of this work, with a prescribed minimum expenditure therefor each year, was, as we have said, the purchase price for the land, payable in yearly installments, the grantors having fully performed their part by conveyance and delivery of the land. . . .

". . . That there was a liability in favor of the grantors imposed on the city upon the acceptance by it of the conveyance seems clear. The ability of the creditor to enforce a claim by a judgment for money is not essential to a 'liability' as that term is used in such

constitutional provisions as ours. . . The words 'any . . . liability in any manner or for any purpose' in our constitutional provision are words of broad import, and we think that, fairly construed, they include such an obligation as the one here involved.

"The facts of this case present what at first blush appears a rather novel application of the constitutional provision, but when the real transaction between the parties is fully understood, the matter appears simple enough. We are not concerned here with the indebtedness to be created in favor of contractors, materialmen, and workmen when the city each year contracts for the doing of certain work, or buys material and employs labor for the doing of the same. We have here simply the liability *to the grantors,* created by the acceptance of the conveyance. As to them, the transaction was simply one of sale and purchase, completely executed by the grantors, the consideration being the future improvement by the city of the conveyed premises in a specified way for the benefit of the grantors . . . It was the construction of the improvement at the specified cost year year, presumably to the benefit of their property, that constituted the consideration for their conveyance . . .

"In the view we take of the nature of this transaction, it is obvious that such cases as *McBean* v. *Fresno,* 112 Cal. 160, (53 Am. St. Rep. 191, 31 L.R.A. 794, 44 Pac. 358), *Smilie* v. *Fresno,* 112 Cal. 311, (44 Pac. 556), and *Doland* v. *Clark,* 143 Cal. 176, (76 Pac. 958), are in no way in point. Here the *full liability* to the grantors was created *upon the acceptance of the deed, the entire consideration therefor having been furnished.* The cases cited involved contracts for the furnishing to a city in the future of service, materials, etc., and it is held that no indebtedness or liability within the meaning of the constitutional provision is incurred until the furnishing of the service, materials, etc., the consideration for the payment to be made. The dis-

tinction is clear, and is recognized by many decisions. It is concisely stated in *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1, 20, (43 L. Ed. 341, 19 Sup. Ct. Rep. 77, see, also, Rose's U. S. Notes), as follows: 'In the one case the indebtedness is not created until the consideration has been furnished; in the other (where the consideration on the other side is fully furnished at the time of the transaction) the debt is created at once, the time of payment being only postponed.' " (Emphasis added.)

If in the instant case we accept the Government's theory, first, that the electrification of the bridges, establishment of harbor lines and the making available for use the abutting lands was the consideration which the County of Alameda asked and the Government gave in return for the county's agreeing to operate, maintain, repair and replace the bridges; second, that the so-called contract was executed prior to 1913; and third, that therefore lack of mutuality was no defense, then it must follow that the "full liability" of the County of Alameda to the United States Government was created upon the execution of the Government's part of the contract, "the entire consideration therefor having been furnished". As was said in the *Carmichael* case, we are not here concerned with the indebtedness to be created in favor of contractors, materialmen and workmen when the county contracted each year for the doing of certain work or the purchase of certain materials. It was the promise to operate, maintain, repair and replace the bridges—presumably for the benefit of the United States Government—that constituted the consideration for the execution of the alleged agreement.

The reasoning of the *Carmichael* case in interpreting section 18 of article XI of the constitution was applied by the Supreme Court of California to facts similar to those now before this court, in the cases of *San Francisco* v. *Boyle,* 195 Cal. 426, 433, 233 Pac. 965, 967; *City of*

Pasadena v. *McAllister,* 204 Cal. 267, 273, 267 Pac. 873, 874, and *Modesto Investment Co.* v. *Modesto City School District,* 213 Cal. 410, 413, 2 P. (2d) 387, 388. In each of these cases the court held void a contract made in derogation of this section of the constitution and in the first two definitely refused to apply the principles laid down in the case of *Fresno* v. *McBean,* 112 Cal. 159, 44 Pac. 358.

In the case of *Mahoney* v. *San Francisco,* 201 Cal. 248, 262, 263, 264, 266, 257 Pac. 49, 55, 56, 57 the city and county leased certain property for a term of years for stipulated rental installments and further agreed to pay additional installments equal to the taxes on said property and to construct improvements to cost large and undetermined amounts. The so-called lease likewise contained an option to purchase with a forfeiture clause. The court in holding the contract void and violative of section 18 of article XI of the constitution said:

> "The reasoning of counsel in an attempt to convert the contract herein into the 'contingency' class, such as is discussed in *Doland* v. *Clark,* 143 Cal. 176 (76 Pac. 958), *McBean* v. *Fresno,* 112 Cal. 159 (53 Am. St. Rep. 191, 31 L.R.A. 794, 44 Pac. 358), *Smilie* v. *Fresno County,* 112 Cal. 311 (44 Pac. 556), *State* v. *McCauley,* 15 Cal. 429, and others treating of similar situations, is fundamentally unsound. . .
>
> ". . . The reason for the constitutional restriction is fully set forth in the case last cited (*Arthur* v. *City of Petaluma,* 175 Cal. 216, 165 Pac. 698) and its purpose and wholesomeness have been too frequently elaborated by this court to require further comment. It is true that some color of justification for the incurrence of the liability herein attempted is to be gleaned from *McBean* v. *Fresno, Doland* v. *Clark, Smilie* v. *Fresno County,* and *State* v. *McCauley.* The first of these cases was a case of an emergency nature and involved the exercise of the police power in its highest sense, to wit, the preservation of the public health. *In re City and*

County of San Francisco, 191 Cal. 172 (215 Pac. 549), was likewise a health case, involving the care of persons afflicted with tuberculosis. The *McBean* case was no doubt written under the urge of the necessities of the situation, and this court has since been careful not to extend the rule beyond the facts therein stated, and has, as a matter of fact, distinguished that case from subsequent cases, thereby given effect to the constitutional provisions. . . The *McBean* case was definitely distinguished from *Chester* v. *Carmichael,* a case similar to the instant case . . . The distinction between that case and the *McBean, Smilie* and *Doland* cases, *supra,* is pointed out. The latter cases cited involved contracts for the furnishing to a city in the future of service, materials, etc., and it is held that no indebtedness or liability within the constitutional provision is incurred until the furnishing of the service, materials, etc., the consideration for the payment to be made, while in the former the full liability was created upon the acceptance of the deed. Here the consideration was the execution and acceptance of the contract of purchase and the putting of the City and County of San Francisco into possession of the property."

As was said in the foregoing case, so it might be said in the present one, that the duties and obligations of the County of Alameda, if any, were certain, definite and fixed and that the liability here sought to be imposed, though not definitely fixed or even estimated in dollars and cents, would inevitably exceed the income and revenue provided for the fiscal year in which the contract, if any, was made.

In the case of *Garrett* v. *Swanton,* 216 Cal. 220, 226, 227, 235, 13 P. (2d) 725, 728, 731, the plaintiffs as taxpayers prayed for a decree for the cancellation of a certain contract between the city and the Fairbanks Corporation and for an injunction to prevent the city from making further payments under the contract and for a decree requiring the defendants to repay the sum of $30,000 already

paid under the contract. According to the purported contract the defendants had agreed to install a pumping plant for the city at a total cost of $152,000 and the city agreed to pay $30,000 in cash upon the commencement of the work and the balance in sixty equal monthly installments. The plaintiffs contended that the total obligation of this contract exceeded the income and revenue of the city for the year in which the contract was executed and that upon the execution of the contract an immediately liability for the full amount of the contract price came into existence. The court said:

> ". . . There can be no doubt that immediately upon entering into the contract a liability arose for the full purchase price. The law is well settled in this state that installment contracts of any kind, where the installment payments are to be made over a period of years and are to be paid out of the ordinary revenue and income of a city, where each installment is not in payment of the consideration furnished that year, and the total amount of said installments when coupled with the other expenditures exceeds the yearly income, are violative of the constitutional provision in question unless approved by a popular vote. This is so whether the contract be denominated a mortgage, lease or conditional sale. (*Chester* v. *Carmichael,* 187 Cal. 287 (201 Pac. 925); *In re City and County of San Francisco,* 195 Cal. 426, (233 Pac. 965); *Mahoney* v. *San Francisco,* 201 Cal. 248 (257 Pac. 49).) It is true that under the doctrine enunciated in *McBean* v. *City of Fresno,* 112 Cal. 159 (53 Am. St. Rep. 191, 31 L.R.A. 794 (44 Pac. 358), *Smilie* v. *Fresno County,* 112 Cal. 311 (44 Pac. 556), *Doland* v. *Clark,* 143 Cal. 176 (76 Pac. 958), *California Pacific Title & Trust Co.* v. *Boyle,* 209 Cal. 398 (287 Pac. 968), contracts for the furnishing of property in the future have been upheld, but only where no liability or indebtedness came into existence until the consideration was actually furnished.

> In other words, such contracts are valid where each year's installment is within the city's income, and where each year's payment is for the consideration actually furnished that year . . . This exception can have no application to the case at bar for the reason that the liability of the city for the entire contract price came into existence at the time the contract was entered into, and the installments were not to be paid each year for the work to be performed in that year. . .
>
> ". . .
>
> "We are not unmindful of the arguments of expediency and necessity advanced by respondents, but we are of the opinion that such arguments are not sufficient to uphold this contract. The constitutional provision involved is based on sound public policy. Arguments of convenience, of policy, or of present necessity, should not be allowed by loose construction to weaken the force or limit the extent of the debt limit provisions."

Courts of other states in interpreting similar constitutional provisions have followed the reasoning which the courts of California have applied in the cases herein cited and in many instances have expressly referred to and relied upon the California cases.[7]

The foregoing authorities amply support the appellant's contention that the alleged contract between the United States Government and the County of Alameda, executed on or before November 10, 1913, violated section 18 of article XI of the constitution and is therefore *ultra vires* and void.

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7. *Sager* v. *City of Stanberry*, 336 Mo. 213, 221-227, 78 S.W. (2d) 431, 435; *Anderson* v. *International School District*, 32 N.D. 413, 422, 156 N.W. 54, 56; *Tamaqua* v. *Krebs*, 25 Pa. D. R. 848; *Brown* v. *City of Corry*, 175 Pa. 528, 530-535, 34 A. 854; *Ramsey* v. *City of Shelbyville*, 26 Ky. L.R. 1102, 83 S.W. 116, 117; *Keller* v. *City of Scranton*, 200 Pa. 130, 133-136, 49 Atl. 781, 782.

III.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH VI OF "CONCLUSIONS OF LAW" THAT "THE EXPENDITURES MADE BY THE COUNTY OF ALAMEDA TO OPERATE AND MAINTAIN THE FRUITVALE AVENUE BRIDGE WERE AND ARE NOT GIFTS TO A PRIVATE CORPORATION OF PUBLIC MONEY PROHIBITED BY SECTION 31 OF ARTICLE IV OF THE CALIFORNIA CONSTITUTION" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE EXPENDITURES MADE BY THE COUNTY OF ALAMEDA TO OPERATE AND MAINTAIN THE FRUITVALE AVENUE BRIDGE ARE AND ALWAYS HAVE BEEN GIFTS OF PUBLIC MONEY OR THINGS OF VALUE TO INDIVIDUALS AND MUNICIPAL OR OTHER CORPORATIONS, PROHIBITED BY SECTION 31 OF ARTICLE IV OF THE CONSTITUTION OF THE STATE OF CALIFORNIA AND VIOLATIVE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES (APPENDIX p. xxxii).

The alleged license agreement, revocable at will by the Secretary of War, purported to forever bind the County of Alameda to expend its funds on the operation, maintenance, repair and rebuilding of the Fruitvale Avenue Bridge which, as well as the land beneath it and on which it rests, has been at all times, and now is the property of the United States. The railroad tracks carrying railroad traffic of a private railroad corporation are, and always have been permanent, integral and inseparable parts of said bridge (Tr. 138, 266).

A. The Alleged License Agreement Requires the County to Make a Gift of its Tax Moneys to a Private Railroad Corporation.

Section 31 of article IV of the California Constitution in so far as pertinent here, provides as follows:

> "The legislature shall have no power . . . to make any gift or authorize the making of any gift, or any public money or thing of value to any individual, municipal or other corporation whatever; . . ."

It is well established law that the term "gift" prohibited by said constitutional provision is not limited to a mere voluntary transfer of property without consideration, but also includes any appropriation of public money for which there is no authority or enforceable claim.

In *Conlin* v. *Board of Supervisors,* 99 Cal. 17, 22, 24, 33 Pac. 753, 755, 756, a state legislative act directed the board of supervisors of the City and County of San Francisco to pay a certain sum remaining unpaid on contracts for which the contractor had no legal claim against the municipality. Upon refusal of the board of supervisors to pay the same, plaintiff brought a mandamus proceeding. The California Supreme Court held that the appropriation was a gift within the prohibition of section 31 of article IV of the State Constitution and stated:

> ". . . An appropriation of money by the legislature for the relief of one who has no legal claim therefor must be regarded as a gift, within the meaning of that term, as used in this section, and it is none the less a gift that a sufficient motive appears for its appropriation, if the motive does not rest upon a valid consideration.
>
> ". . . The constitution makes the same inhibition on an appropriation of public moneys by the legislature without any consideration, that exists against a similar appropriation by a municipality . . ." [1]

It has been held that this constitutional provision prohibits cities as well as counties from making any gifts of public funds and of using public funds for private purposes.

In *San Diego Water Co.* v. *City of San Diego,* 59 Cal. 517, 520, 521, 522, the city agreed with plaintiff to take water and to pay therefor at a rate in excess of that provided in the plaintiff's charter and for water which the

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1. Accord: *County of Los Angeles* v. *Jessup,* 11 Cal. (2d) 273, 275-278, 78 P. (2d) 1131, 1132-1134; and *Goodall* v. *Brite,* 11 Cal. App. (2d) 540, 54 P. (2d) 510.

city was legally entitled to receive without charge. The Supreme Court of the State of California said:

> "Besides, the city itself had no power under its charter to make an engagement with the company to pay for water which the latter was bound by the law of its incorporation to furnish free for 'municipal necessities,' and at reasonable rates to be fixed as required by the law, 'for family uses.'
>
> ". . .
>
> "But it is urged that the meritorious consideration for the contract between the plaintiff and the city, . . . is not the water furnished to the city, but the erection of works and machinery, and conducting the water to the place where the city required it.
>
> "If that were the consideration and nature of the resolution adopted by the Board of Trustees, there is nothing in the charter of the city to sustain it. For the charter contains no express grant of power to the Board to aid in the construction of improvements partaking of a public character, and in the absence of such authority the action of the Board would be unauthorized. But even if there were in the city charter a grant of such power, the Board could not, in the exercise of the power, contract to pay money, or to appropriate the revenues of the city to aid in constructing the works of a *private* corporation. Such a contract would be in violation of the Constitution and laws of the State, beyond the scope of the corporate powers of the city, and any instrument in writing made, or any resolution adopted, for that purpose would be void." [2]

It is submitted that the alleged license agreement which purported to require the County of Alameda to expend its tax moneys to forever operate, maintain, repair, and when necessary, rebuild the Fruitvale Avenue Bridge, a combination railroad, highway and pedestrian bridge used

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2. Accord: *Pacific Indemnity Co.* v. *Myers*, 211 Cal. 635, 643, 296 Pac. 1084, 1087; *Chapman* v. *City of Fullerton*, 90 Cal. App. 463, 468, 265 Pac. 1035, 1037; and *Comstock* v. *Davis*, 44 Cal. App. 275, 277, 186 Pac. 380.

continually by a private railroad corporation for the transit of trains thereover, involved the expenditure of said public funds for a private purpose as distinguished from a public purpose and such expenditure would constitute a gift to a private railroad corporation within said constitutional prohibition.

In *Higgins* v. *San Diego Water Co.*, 118 Cal. 524, 546, 547, 45 Pac. 824, 828, 829, 50 Pac. 670, there was a lease from a water company to five persons and a sublease from them to a city of the entire water company plant at a monthly rental. Among other things the lease provided that the sublessor should cause a railroad to be constructed. The Supreme Court of the State of California said:

> ". . . It is claimed by counsel for respondent, and seems to be conceded by counsel for appellant, that a contract by a municipal corporation of California to pay money to any person or corporation to secure the construction of a railroad would be void because in violation of section 31 of article IV of the constitution . . ."

The court then stated:

> "It does not seem entirely clear that such a contract would come within the strict terms of this provision, but certainly it would involve, in part at least, *the evils which the constitutional restriction was designed to prevent,* because it would afford *a ready means of accomplishing by indirection what could not be done openly and avowedly.* It is not necessary, however, to decide this question here, for there is no suggestion that the charter of San Diego confers authority upon the common council to expend any portion of the municipal funds in constructing or aiding the construction of railroads; and, in the absence of such authority, an agreement of the character supposed would necessarily be invalid." (Emphasis added.)

Hence from the foregoing decision it would appear to be certain that since the county was and is prohibited from

directly subsidizing the construction of a railroad, it was and is likewise prohibited from expending its tax moneys in aid of a private railroad corporation through any indirection such as the alleged license agreement with the United States. If it were otherwise, certainly *"the evils which the constitutional restriction was designed to prevent"* would afford *"a ready means of accomplishing by indirection what could not be done openly and avowedly."*

In complete harmony with the foregoing California decisions the court in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 141, 147, 89 P. (2d) 460, 462, 465, 466, *held the alleged license agreement now in issue before this court to be illegal and void* and said:

> *". . . and because the particular indebtedness which is involved in this proceeding constitutes a gift of public funds to a private corporation in conflict with article IV, section* 31, *of the Constitution of California.*
>
> ". . .
>
> "The board of supervisors of Alameda County had no authority to incur indebtedness or expend public funds for the sole benefit of the Southern Pacific Railroad Company, a private corporation. It appears that the materials which are involved in this proceeding are solely for the improvement and benefit of the Southern Pacific Railroad Company tracks across the bridge. The payment of the indebtedness which is here involved is in the nature of a gift or free contribution to the corporation, and it is, therefore, illegal and void. (Art. IV, sec. 31, Const. of Calif.; *County of Los Angeles* v. *Jessup,* 11 Cal. 2d 273, [78 Pac. 2d 1131]; *Goodall* v. *Brite,* 11 Cal. (2d) 540, [54 Pac. (2d) 510]; *First National Bank of Orland* v. *Ball,* 90 Cal. App. 709, [266 Pac. 604]; *Powell* v. *Phelan,* 138 Cal. 271, [71 Pac. 335].) In *Higgins* v. *San Diego Water Co.,* 118 Cal. 524, [45 Pac. 824, 50 Pac. 670], *it was held that a contract by a municipal corporation to pay public funds to a corporation or to an individual for the con-*

struction of a railroad is violative of article IV, section 31, of the Constitution and, therefore, void." (Emphasis added.)

The state courts throughout the United States are also in accord with the California decisions heretofore discussed.

In *Nassau County* v. *City of Long Beach,* 272 N. Y. 260, 266-267, 5 N.E. (2d) 811, 814, a statute which relieved a city of liability to a county for the amount of uncollected taxes certified to it for collection was held unconstitutional and void because the city's indebtedness to the county constituted "property" which could not constitutionally be devoted to private purposes by the county and if released to the city, the city *might* devote it to such private purposes. The court stated:

> "That asset of the county could not legally be devoted to private purposes under the provision of the Constitution either voluntarily by the act of the county or by compulsion under an act of the Legislature. The city is engaged in private purposes as well as in public functions and the Constitution in unmistakable terms forbids the use of its property or credit for such private purpose. . ." [3]

In the preceding decision the action by the county would have at least been under the color of a statutory authorization, even though unconstitutional and void, whereas in the issue now before this court, the action by the County of Alameda in entering into said alleged license agreement was not even under the color of any authorization whatever.

In addition, the case now before this court is a much more flagrant violation of a similar constitutional prohibition than in the preceding case discussed. In said preceding

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3. Accord: *Mahon* v. *Board of Education,* 171 N. Y. 263, 63 N.E. 1107; *Oswego Falls Corporation* v. *Fulton,* 148 Misc. 170, 265 N.Y.S. 436, 442; affirmed 268 N.Y.S. 978; *People* v. *Holten,* 287 Ill. 225, 232, 233, 122 N.E. 540, 543; *Skutt* v. *City of Grand Rapids,* 275 Mich. 258, 266 N.W. 344, 347; *Stell* v. *Mayor and Aldermen of Jersey City,* 95 N.J. Law 38, 111 A. 274; and *Farnsworth* v. *Town of Wilber,* 49 Wash. 416, 420, 421, 95 Pac. 642, 644.

case the county assets so relinquished to the city *might* have been used for a private purpose, whereas, pursuant to the terms of the alleged license agreement now before this court, the county assets *must* be used for a private purpose, to wit, the operation, maintenance, repair and when necessary the rebuilding of the Fruitvale Avenue Bridge for the continual use of a private railroad corporation in the manner hereinbefore set forth.

In *Garland* v. *Board of Revenue of Montgomery County,* 87 Ala. 223, 224-228, 6 So. 402, 403, an act which authorized counties to erect a bridge which might be either a free foot and wagon bridge for the traveling public or a railroad bridge, *or both combined,* was held to violate a constitutional provision which declared that the legislature should have no power to authorize any county to lend its credit, or to grant public money or a thing of value in aid of, or to any individual, association or corporation.

As heretofore pointed out, without any constitutional, statutory or charter authorization the board of supervisors of Alameda County purported by said alleged license agreement to forever operate, maintain, repair and when necessary replace a combination railroad, vehicular and pedestrian bridge for the use of a private railroad. Assuming, for the sake of argument only, that there had been a statute so authorizing such a type of agreement, the County of Alameda or its board of supervisors could not have become bound thereby, for, as seen by the foregoing decision, such a statute would clearly be unconstitutional as granting county tax moneys in aid of a private railroad corporation. Therefore it is certain that the action taken without any authorization violated the constitutional prohibition under discussion.

In *Board of Education* v. *Alton Water Co.,* 314 Ill. 466, 471, 145 N.E. 683, 685, a city had granted a water company a franchise which provided among other things that the

water company would furnish free water to all public and parochial schools in the city, to be paid for by city taxes. The Supreme Court of the State of Illinois held petitioner not to be entitled to free water and said:

> ". . . A municipal corporation holds its property in trust for public uses, and its funds can be used only for corporate purposes. They cannot be diverted to private use. Nor can the municipal authorities or the electors give away the money or property of the municipality . . .
>
> "The city of Alton and the appellate Board of Education are separate corporate entities, each clothed with the power of taxation for its corporate purposes and for none other. They are organized under different laws for a specific purpose. The parochial schools are purely private institutions, and neither municipal corporation has any authority to contract or levy a tax for their benefit . . ."

The foregoing decision is precisely to the same effect as that of the Supreme Court of the State of California in *Higgins* v. *San Diego Water Co.,* 118 Cal. 524, 546, 547, 45 Pac. 824, 828, 829, 50 Pac. 670. So in this case neither the County of Alameda nor its board of supervisors could so contract with the United States that a private railroad corporation would obtain the free and continual use of the Fruitvale Avenue Bridge forever at the expense of the taxpayers of the County of Alameda.

Alter v. *City of Cincinnati, et al.* and *Ampt* v. *Same,* 56 Ohio St. 47, 63-64, 66, 46 N.E. 69, 70, 71, were actions to test the constitutionality of a municipal water works act which among other things provided that part of the water works would be owned by the city and another part thereof would be owned by a corporation or individual, and would be operated, managed and conducted by the city. The constitution prohibited the assembly from authorizing a county or city from loaning its credit to, or in aid of a company

or corporation. The Supreme Court of Ohio held the statute unconstitutional and said:

> ". . . The municipality must be the sole owner and controller of the property in which it invests its public funds. A union of public and private funds or credit, each in aid of the other, is forbidden by the constitution. There can be no union of public and private funds or credit, nor of that which is produced by such funds or credit. The whole ownership and control must be in the public. . . .
>
> ". . .
>
> ". . . The provision that the works shall be operated, managed and conducted by the city does not relieve the matter, because, before the city can operate the works, it must first obtain a lease upon such terms as may be agreed upon, and that puts it beyond the power of the city to operate and control the works as sole proprietor. It would be a joining of two properties, owned by different parties, together to make one property, the parts owned by each being necessary to the successful operation of the whole, and each owner having his say as to the terms and conditions upon which the whole shall be operated. . . ."

The same reasoning as in the foregoing decision compels the conclusion that the County of Alameda "must be the sole owner and controller of the property in which it invests its funds." The expenditure of county tax funds on the Fruitvale Avenue Bridge belonging to the United States, over which the trains of a private railroad corporation continually pass, can scarcely be said to comply with this requirement.

The expenditure of public funds, directly or indirectly, in aid of a private railroad corporation, is a violation of the "due process clause" of the Constitution of the United States. An early outstanding decision on "due process of law" is *Taylor* v. *Porter,* (N.Y.) 4 Hill 140, where a statute authorizing a private road for the benefit of B,

to be laid out over the lands of A, without the consent of A, was held unconstitutional and void. It was held that the legislature could not take the property of A and transfer it to B without violating the "due process" clause. Cited with approval by the Supreme Court of the United States in *King* v. *Mullins,* 171 U. S. 404, 429, 430, 43 L. ed. 214, 224.

In *Eyers Woolen Co.* v. *Town of Gilsum,* 84 N.H. 1, 16, 24-28, 146 Atl. 511, 524, an act authorizing a town to exempt a new woolen mill from taxation for not more than ten years was held invalid under a constitutional provision prohibiting the general court from authorizing any town to loan or give its money or credit, directly or indirectly, for the benefit of any corporation having for its object a dividend of profits. The Supreme Court of the State of New Hampshire further held that an appropriation of money raised or to be raised by taxation to aid private manufacturers was not "due process" and was a violation of the Fourteenth Amendment of the Constitution of the United States, as being the taking of private property of one person for the private use of another person.

It is accordingly submitted that any transfer of county moneys belonging to the taxpayers of the County of Alameda to the use of a private railroad corporation through the medium of the alleged license agreement with the United States was, and is a violation of the "due process" clause of the United States Constitution.

The decisions of the federal courts are in complete accord with the foregoing firmly established principles of California and other state courts. The federal courts have held that tax moneys cannot be diverted to private purposes.

In the leading case of *Citizens' Savings and Loan Association* v. *Topeka,* 20 Wall. (U.S.) 655, 659, 22 L. ed. 455, 460, where it appeared that the city of Topeka had issued

bonds to aid and encourage a bridge manufacturing company to establish a bridge works in the city, relying on a statute vesting such a power in the city, the Supreme Court of the United States held that the statute was void as an attempt to authorize taxation for a nonpublic purpose.[4]

It is submitted that obviously the expenditure of public funds by the County of Alameda to operate, maintain, repair and when necessary to replace this bridge for the use and benefit of a private railroad corporation is for a private purpose, as distinguished from a public purpose, and constitutes a gift within the constitutional prohibition contained in section 31 of article IV of the Constitution of the State of California and is a violation of the Fourteenth Amendment to the Constitution of the United States, as it constitutes the taking of private property of one person for the private use of another person.

Furthermore, if at any time this bridge became unnecessary for highway and pedestrian purposes, the county could never abandon the same if said alleged license agreement is valid and binding. The county would nevertheless be bound to forever operate, maintain, repair and rebuild said bridge for the sole use and benefit of a private railroad corporation which would clearly be making a prohibited gift of public money to a private railroad corporation.

B. The Alleged License Agreement Requires the County of Alameda to Make a Gift of County Tax Moneys to the United States.

The foregoing decisions set forth in the preceding section A are also applicable here. The additional cases hereinafter referred to also compel the conclusion that the alleged license agreement was, and is void as providing

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4. Accord: *Sutherland-Innes Co.* v. *Evart* (C.C.A. 6th 1898) 86 Fed. 597, 601, 30 C.C.A. 305; *Cole* v. *La Grange*, 113 U.S. 1, 28 L. ed. 896, 5 Sup. Ct. 416; *Parkersburg* v. *Brown*, 106 U.S. 487, 27 L. ed. 238, 1 Sup. Ct. 442; and *Dodge* v. *Mission Twp.* (C.C.A. 8th 1901) 107 Fed. 827.

for an unconstitutional gift by the County of Alameda to the United States.

In *State* v. *County Court,* 142 Mo. 575, 584, 44 S. W. 734, the Supreme Court of the State of Missouri concluded that the legislative act requiring a county court to draw warrants to such towns within the county as should make application for a portion of the county taxes levied and collected upon property within the limits of such towns for expenditure on the roads therein, was in conflict with the constitutional provision prohibiting the making of any grant of public money "to any individual, association of individuals, municipal or other corporation whatsoever".[5]

Just as the *county* in the preceding case, though acting under the purported authority of a statute, was precluded from making a grant of its public money to a *town,* so the *County of Alameda* or its board of supervisors, not even acting under color of any statutory authorization whatever, was certainly precluded from making a grant of its public tax moneys to the *United States* for the perpetual operation, maintenance, repair and whenever necessary the rebuilding of a bridge belonging to said United States and located on land also belonging to it. Nor would the result have been any different if a statute had purported to authorize such grant, as such statute would have been in violation of section 31 of article IV of the state constitution. Any permanent improvement of, repair to, or rebuilding of said bridge would be the property of the United States. Because of the revocable nature of the alleged license in question, permanent improvements involving large expenditures of county tax funds or even a replacement of said bridge at an estimated cost of approximately $1,250,000 might be concluded one day at the county's expense and, by revocation of said license by the United

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5. Accord: *Russell* v. *Tate,* 52 Ark. 541, 545, 13 S.W. 130, 132; and *Miller* v. *City of Cornelia,* 188 Ga. 674, 4 S.E. (2d) 568, 569.

States, the following day the County of Alameda would become forever deprived of any use and benefit whatsoever from such expenditure. *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 141, 89 P. (2d) 460, 462, 463.)

It is submitted that this would clearly constitute a gift of public funds to the United States which not only is not authorized by statute, but is expressly prohibited by section 31, article IV of the state constitution.

IV.

THE COURT ERRED IN NOT CONCLUDING AS A MATTER OF LAW THAT THE ALLEGED CONTRACT BETWEEN THE UNITED STATES AND THE COUNTY OF ALAMEDA, NOT SPECIFYING ANY TIME FOR WHICH SAID COUNTY WAS BOUND TO OPERATE, MAINTAIN, REPAIR AND IF NECESSARY, REBUILD THE FRUITVALE AVENUE BRIDGE, WAS CONTRARY TO PUBLIC POLICY AND VOID AND/OR WAS SUBSTANTIALLY COMPLIED WITH AFTER A REASONABLE TIME AND/OR WAS TERMINABLE AT THE WILL OF EITHER PARTY (APPENDIX p. xxxvi).

In its complaint for declaratory judgment the United States Government prayed for an order whereby the County of Alameda would be *forever* bound to operate, maintain, or rebuild the Fruitvale Avenue Bridge (Tr. 15). Assuming for the sake of argument only that the alleged contract is not void for want of consideration or mutuality nor because of the fact that it was a contract beyond the scope of the authority of the board of supervisors to execute, and assuming further that the said contract was not invalid because the expenditure therein provided for exceeded the income and revenue for the fiscal year 1913-14 in contravention of the provisions of section 18 of article XI of the California Constitution, or because the expenditure was such a gift of public money to a private corporation as was prohibited by section 31 of article IV of said constitution, and the "due process" clause of the United

States Constitution, and that said contract was not void for uncertainty or unfairness, it would still be uneforceable and void because of the absolute lack of any provision therein for any definite time during which the parties were bound by the terms of the alleged agreement.

The resolution of 1909 read in part as follows:

> "BE IT RESOLVED that the County of Alameda . . . hereby agrees to accept said bridges . . . and to assume all costs of future repair, operation and replacement of said bridges. . ." (Tr. 168.)

The revocable license issued by the United States Government in 1910 read in part as follows:

> "This license is granted subject to the following conditions and provisions:
>
> ". . .
>
> "4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed or become inadequate for the purpose they serve." (Tr. 172.)

The resolution of the board of supervisors of 1913 provided:

> "BE IT RESOLVED that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor . . . subject to the provisions and conditions of the aforesaid License of September 3, 1910 . . ." (Tr. 175.)

A reading of the foregoing excerpts from the only documents which even purport to constitute a contract conclusively establishes the fact that the alleged agreement was entirely silent as to the time during which the County of Alameda was to maintain and repair the bridges. In the absence of any specification as to the time during which the county was bound, the district court should have

found as a matter of law that these documents must have been construed in one of the three following ways:

A. As an attempt to bind the county to do these things for all time to come, hence *ultra vires* and void, a construction opposed to public policy and to the overwhelming weight of the authorities of both state and federal courts; or

B. As an attempt to bind the county for a reasonable time and therefore substantially complied with after a period of twenty-seven years and an expenditure of over $700,000; or

C. As an agreement terminable at the will of either party after due notice and hence terminated by the notice of the board of supervisors of the County of Alameda dated September 28, 1939, wherein the United States Government was notified that Alameda County would cease to operate the Fruitvale Avenue Bridge after the 31st day of December 1939 (Tr. 176).

A. A Contract Which Purports to Bind a County for All Time to Come in Regard to a Governmental Function is Against Public Policy and Void.

If the alleged contract between the county and the federal government sought to bind the county to maintain, repair and replace the bridges for all time to come, it was void as against public policy and unenforceable. The legislative body of the state or a subdivision thereof is without authority to make contracts which will bind successive legislative bodies in regard to governmental functions for an indefinite period or *in perpetuo* and any contract which seeks so to do is void.

This rule was enunciated by the Supreme Court of the United States in the case of *Newton* v. *Commissioners,* 100 U. S. 548, 559, 25 L. ed. 710, 711. In 1846 the State of Ohio passed a statute providing that upon the fulfillment of certain terms and conditions by the citizens of the

town of Canfield the county seat would be "permanently established at that town". These terms and conditions were complied with and the county seat was established accordingly. In 1874 the legislature passed an act providing for the removal of the county seat to Youngstown, whereupon the citizens of Canfield filed a bill in equity to perpetually enjoin the removal of the courthouse.

The Supreme Court of the United States in holding that there could be no contract or irrepealable law concerning "governmental subjects" said:

> "They involve *public interests,* and legislative acts concerning them are necessarily *public laws.* Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil."

In the case of *Illinois Central R. R. Co.* v. *Illinois,* 146 U. S. 387, 459, 460, 36 L. ed. 1018, 1045, 13 Sup. Ct. 110, 120, 121, the United States Supreme Court in commenting upon the case of *Newton* v. *Commissioners, supra,* stated:

> "As counsel observe, if this is true doctrine as to the location of a county seat it is apparent that it must apply with greater force to the control of the soils and beds of navigable waters in the great public harbors held by the people in trust for their common use and of common right as an incident to their sovereignty. The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which

> may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it.

The reasoning of the foregoing cases is compelling in the case at bar. That the maintenance of a bridge as part of a highway system of a county is a governmental function, is not open to question. It is hard to conceive of any function of government that is more open to the vicissitudes of the growth and progress of population and commerce than the public streets and highways and, hence, of any bridge forming a part thereof. Within a relatively short time population centers and business districts may shift from one part of a county to another; within twenty-five years new means of transportation and communication may make obsolete and unnecessary roads and highways which are imperative today. Whereas today a bridge may be the most economical means of crossing the Tidal Canal at a particular point, within twenty-five years a tube or some other means of traversing the said span may constitute the only practical means of meeting the needs of that time. It is also conceivable that within twenty-five years there may be so many and such urgent needs which must be met by the tax rate of that period, that the board of supervisors of Alameda County might in their discretion decide that it was unnecessary, undesirable, impractical or even impossible for Alameda County to continue to operate the Fruitvale Avenue Bridge at an approximate cost of one thousand dollars a month. Traffic might move up and down the Estuary so that the Park Street Bridge or the High Street Bridge, or both, might be sufficient to accommodate its needs. No one can foretell what the future needs of a county may be, hence no one board of supervisors can or should be permitted to bind a

county indefinitely to any particular program regarding so important a matter.

This proposition was discussed in *Wabash Railroad Co.* v. *Defiance,* 167 U. S. 88, 93, 94, 97, 98, 100, 42 L. ed. 87, 90, 91, 92, 93, 17 Sup. Ct. 748, 750, 751, 752, 753, wherein the question was whether a city ordinance dated December 20, 1887, permitting the railway to construct certain bridges and their approaches constituted a contract between the railroad company and the city for the perpetual maintenance of such bridges and whether the subsequent ordinance of 1893 changing the grade of streets and approaches impaired the obligation of the contract or deprived the railroad company of its property without "due process" of law, and the United States Supreme Court said:

> "The language of this ordinance is rather that of a license than that of a contract: the railway is authorized to erect new bridges of a certain construction, provided that the company shall also build sufficient approaches and grade to each of said bridges, and keep them in good repair. The city itself agrees to do nothing, except to permit gravel to be taken from its gravel bed, without charge, for the construction of such approaches. It does not agree that the bridges or their approaches shall remain any particular length of time, or that it shall not make new requirements as the growth of the city may seem to suggest. The only contract as to time which could possibly be extracted from this ordinance would be that the railway company, on building the bridges and approaches, should be entitled to maintain them in perpetuity. The result would be that, . . . they would stand forever in the way of any improvement of the streets. This proposition is clearly untenable. It is incredible, in view of the language of this ordinance, that the city could have intended, or the railroad company have expected, that the former thereby relinquished forever the right to improve or change the grade of these streets.

". . . It is claimed that the construction of the sidewalks by the railroad company was a consideration, since it had been the duty of the city up to that time to keep them in repair; but it surely could not be a consideration for the perpetual maintenance of the bridges. If it were a consideration for anything it would simply be for the permission given to the railway to build the bridges—a permission obtained upon a special application of the railway company. Properly construed, this ordinance was simply a license to the company to build these bridges, and to continue them until the city council should conclude that it was for the public interest to so change the grade of the street as to make it a level crossing.

" . . .

". . . If the court, however, is to be considered as holding that an agreement or license to construct bridges, which is silent as to time, should be construed as an agreement that they are to remain in perpetuity, we should find ourselves confronted with too many authorities to the contrary to accept it as a sound exposition of the law.

". . . Indeed, the right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety and morals of its inhabitants."

In the case of *Boise City Artesian Hot and Cold Water Company* v. *Boise City* (C.C.A. 9th, 1903) 123 Fed. 232, 235, the court said:

". . . *irrespective of such constitutional limitation,* it is clear, both upon reason and authority, that no municipal corporation, in the absence of express legislative authority, has power to grant a perpetual franchise for the use of its streets. . . A municipal corporation intrusted with the power of control over its public streets cannot, by contract or otherwise, irre-

vocably surrender any part of such power without the explicit consent of the Legislature. Cooley's *Constitutional Limitations* (2d Ed.) 205, 210; Dillon on *Municipal Corporations,* § § 715, 716; *Barnett* v. *Denison,* 145 U. S. 135, 139, 12 Sup. Ct. 819, 36 L. Ed. 652. . ." (Emphasis added.)

In the case of *State ex rel. City of St. Paul* v. *Minnesota Transfer Ry. Co.* 80 Minn. 108, 118, 83 N.W. 32, 36, the court in holding that the city had no power, either express or implied, to enter into a contract whereby it assumed for all times to repair a bridge, stated:

". . . We are of opinion that an agreement on the part of the city to maintain this bridge for all time was beyond the power of the officers of the city, contrary to public policy, void, and of no effect, . . ."

In *Robbins* v. *Hoover,* 50 Colo. 610, 616, 115 Pac. 526, 528, the court in declaring void a bequest for a county hospital, provided the county commissioners should support and maintain the same, said:

". . . Each year the board must make its various appropriations of money for the necessary public purposes, and levy the necessary taxes to meet them. Within the statutory or constitutional limits each board must for itself determine the tax levy and the amount of such appropriations, and it is beyond the power of any board, in any one year, to determine for its successor in any subsequent year how it shall perform such duties, or prescribe or limit its action in the exercise of governmental functions, all of which is equivalent to saying that, under our existing laws, it is legally impossible for a board of commissioners to bind the county forever to maintain and support the hospital which Mr. Macky was desirous of building, and, for that reason, his bequest is void as depending upon an impossible condition."

In *Glenn* v. *Moore County Com'rs.,* 139 N.C. 412, 417, 52 S.E. 58, 60, the plaintiff sought to compel the county commissioners to repair a public bridge originally built by the plaintiff's predecessors in interest as a private bridge and later conveyed to the county in consideration of the county's maintaining the same. The court in denying the writ stated:

> ". . . We do not think it competent for a board of commissioners to enter into a contract with a citizen to perpetually maintain and keep in repair a public road or bridge, giving to such citizen a cause of action against the county whenever, in the exercise of its discretion in the interest of the public, the same or another board shall deem it proper to discontinue such road or bridge. The power vested in and duly imposed upon boards of commissioners to open and maintain roads and erect and keep in repair public bridges is for the benefit of the public, and they have no power to exercise it for any other purpose, or to bind their successors in that respect. . . ."

In the case of *Board of Sup'rs. of Apache County* v. *Udall,* 38 Ariz. 497, 509, 1 P. (2d) 343, 348, the facts of which are set forth on page 26, the court stated:

> "Further, the contract binds Apache county to maintain the road indefinitely 'to the satisfaction of the Secretary of Agriculture.' The statutes give the supervisors of a county the right to abandon county highways under the circumstances and in the manner provided in section 1701, *supra.* We are of the opinion in the absence of express statutory authority they may not contract away this right and the contract is void for this reason also."

Numerous other cases from various jurisdictions have held that a contract which seeks to impose upon a political subdivision of the state a perpetual obligation to do a

certain thing or spend public money in a certain way is against public policy and void.[1]

If the Government contends that the purported agreement between the County of Alameda and the United State Government binds the County of Alameda to operate, maintain, repair and rebuild the Fruitvale Avenue Bridge for all future time, then the purported contract is opposed to public policy and void.

B. A Contract Which Was Silent As to the Time of Its Duration Was Substantially Complied With After a Reasonable Time, To-Wit, After a Period of Twenty-Seven Years.

Because a contract to which a public governmental body is a party is against public policy and *ultra vires* if it purports to grant a perpetual right or to impose a perpetual obligation, the courts are hesitant, unless compelled so to do by the unequivocal language of the instrument itself, to construe an agreement as an attempt to bind the parties for all time to come but rather are inclined to hold that the intent of the parties was that they should be bound for a reasonable time or until either of them terminated said agreement.

In the early case of *Newton* v. *Commissioners,* 100 U.S. 548, 561, 562, 25 L. ed. 710, 712, a statute provided that a county seat should be *permanently* established in the City of Canfield. In denying an injunction to prevent the removal of the county seat therefrom, the Supreme Court of the United States said:

> "The rules of interpretation touching such contracts are well settled in this court. In *Tucker* v. *Ferguson* (22 Wall. 527) we said: 'But the contract must be

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1. *City of Brenham* v. *Brenham Water Co.*, 67 Tex. 542, 554, 4 S.W. 143, 149; *Horkan* v. *City of Moultrie,* 136 Ga. 561, 562, 71 S.E. 785; *City Council of Augusta* v. *Richmond County,* 178 Ga. 400, 173 S.E. 140, 141; *Aven* v. *Steiner Cancer Hospital,* 189 Ga. 126, 139, 140, 5 S.E. (2d) 356, 364; *State ex rel. Townsend* v. *Board of Park Com'rs.* 100 Minn. 150, 154, 110 N.W. 1121, 1122; *Belden* v. *City of Niagara Falls,* 230 App. Div. 601, 603, 245 N.Y. Supp. 510, 512; *Hamilton* v. *City of Shelbyville,* 6 Ind. App. 538, 543, 33 N.E. 1007, 1009.

shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend *either in scope or duration* beyond what the terms of the concession clearly require.' There must have been a deliberate intention clearly manifested on the part of the State to grant what is claimed. Such a purpose cannot be inferred from equivocal language. . . ."

". . .

". . . If the legislature had intended to assume an obligation that it should be *kept there* in perpetuity, it is to be presumed it would have said so. We cannot—certainly not in this case—interpolate into the statute a thing so important, which it does not contain. The most that can be claimed to have been intended by the State is, that when the conditions prescribed were complied with, the county seat should be then and thereupon 'permanently established' at the designated place. We are, therefore, to consider what is the meaning of the phrase 'Permanently established.' . . . So the county seat was permanently established at Canfield when it was placed there with the *intention* that it should remain there. This fact, thus complete, was in no wise affected by the further fact that thirty years later the State changed its mind and determined to remove, and did remove, the same county seat to another locality. It fulfilled at the outset the entire obligation it had assumed. It did not stipulate *to keep* the county seat at Canfield perpetually, and the plaintiffs in error have no right to complain that it was not done. *Keeping it there* is another and a distinct thing, in regard to which the eighth section of the act is wholly silent . . ."

In the later case of *Texas & Pac. R. Co.* v. *Marshall,* 136 U. S. 393, 401, 402, 34 L. ed. 385, 388, 389, 10 Sup. Ct. 846, 847, 848, a city agreed to give the railroad company land in consideration of the railroad's agreement

"to permanently establish its eastern terminal and Texas offices at the city. . ." Nine years later the city attempted to enjoin the railroad from removing its terminus therefrom. The Court in denying the injunction states:

> "If it were not for the word 'permanent,' as found in the communication of the committee of the city of Marshall to Mr. Scott, we should not think it easy to justify the inference that the obligation was to maintain forever at that place what the company engaged to establish there. . .
>
> ". . . The object of the city might very well be supposed to have been attained by the selection of the city as a terminus of the railroad, the construction and establishment there of its offices, . . . And in point of fact it appears that for a period of about eight years they were permanently located at the city of Marshall. If, however, the city desired something more than this, if it desired to make sure that these establishments should forever remain within the limits of the city of Marshall, and that the railroad company should be bound to keep them there forever, such an extraordinary obligation should have been acknowledged in words which admitted of no controversy. It would have been very easy to have inserted into this contract language which forbade the company from ever removing the terminus of the road to some other point, or from ever removing or ceasing to use the depot, or the car and machine shops, and thus have made the obligation perpetual. . ."

It should be noted that the Supreme Court of the United States in the two foregoing cases as well as in the case of *Mead* v. *Ballard,* 74 U. S. 290, 294, 19 L. ed. 190, 192, had before it contracts which provided for the "permanent" establishment of a county seat, "permanent" establishment of an eastern terminal and "permanent" location of an institution of learning and yet in each case refused so to construe the contract as to impose upon the defendant

as perpetual obligation to perform the duties set forth therein. [2]

In *Holt* v. *Saint Louis Union Trust Co.* (C.C.A. 4th 1931) 52 F. (2d) 1068, 1069, the court in discussing the length of time for which the parties were bound by a contract which specified no particular time for its duration, quoted the following language from Williston on Contracts § 38:

> "It is not often that a promise will properly be construed as calling for perpetual performance. Only in such negative promises as to forbear suit or not to carry on a business or occupation is so broad a construction likely to be permissible. More commonly the true construction will mean some period short of infinity; and partly in order to carry out supposed actual intention of the parties and partly, doubtless, in order to prevent an offer or agreement from being ineffectual because too indefinite, courts will, where the contract contemplates a single act or exchange of acts unless the circumstances show a contrary intention, construe a promise which does not in terms state the time of performance as intending performance in a reasonable time. . . ."

In view of the foregoing authorities it is submitted that the alleged license agreement did not by its express terms designate that the County of Alameda should be perpetually bound to operate, maintain, repair and rebuild the Fruitvale Avenue Bridge and that in the absence of such an intent, expressed in unequivocal language, the district court erred in not holding that the contract was substantially performed by the said county when it accepted and assumed control of the three bridges in accordance with the resolution of November 10, 1913, and continued to

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2. Accord: *Jones* v. *Newport News* (C.C.A. 6th 1895) 65 Fed. 736, 742; *Town of Readsboro* v. *Hoosac Tunnel & W. R. Co.* (C.C.A. 2d 1925) 6 F. (2d) 733, 735; *Hasman* v. *Elk Grove Union High School*, 76 Cal. App. 629, 633, 245 Pac. 464, 466; *Dover Copper Mining Co.* v. *Doenges*, 40 Ariz. 349, 357, 12 P. (2d) 288, 292.

operate, maintain and repair the Fruitvale Avenue Bridge for a period of twenty-seven years and that the county did not in any way obligate itself to continue to operate the same for any definite period or for all time to come.

In *Union Stockyards Company* v. *Nashville Packing Company* (C.C.A. 6th 1905) 140 Fed. 701, 705, 706, the court in denying an injunction against the defendant dismantling a packing house standing on certain lands which had been conveyed to it upon the condition that it would erect, equip, operate and maintain such packing house and which the defendant proposed to abandon after a lapse of several years, stated:

> ". . . Another feature of the transaction which seems to us of much significance is that no time was fixed during which the obligation to maintain and operate the packing house should endure. It seems to be hardly reasonable to suppose that the parties could have understood that this covenant should continue to operate perpetually. . .
>
> ". . . A similar question with respect to the duration of the covenant, when there was no limitation in respect of time, has been presented in several reported cases, and the view which has been generally taken is that, when the time is not limited by the language employed, it should be implied that some limitation was intended and that it was such as the nature of the case would indicate as reasonable. Among other cases are . . . *Mead* v. *Ballard,* 7 Wall. 290, 19 L. Ed. 190; *Texas* & *Pacific Ry. Co.* v. *Marshall,* 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385; . . . ; *Murdock* v. *Mayor, etc., of Memphis,* 7 Cold. (Tenn.) 483. In this latter case the court expressed the opinion that the question was to be resolved upon the analogy of the general rule that, where no time is fixed, reasonable time is implied."

In *Texas* & *Pacific Railway Co.* v. *Scott* (C.C.A. 5th 1896) 77 Fed. 726, 731, it was held that the establishment

and maintenance of a station at a point for thirty-six years was a substantial and sufficient compliance with the terms of the contract where no particular time for such maintenance was specified.

In *Sheets* v. *Vandalia R. Co.,* 74 Ind. A. 597, 617, 127 N. E. 609, 616, the court ruled that the abandonment of property for depot purposes forty-three years after the death of the grantor would not authorize his heirs to reenter in spite of a provision in the deed that the lands were given to the defendant on condition that a railroad depot be built.

In *Maryland etc. R. Co.* v. *Silver,* 110 Md. 510, 518, 73 Atl. 297, 300, seventeen years' maintenance of a public station until the "exigencies of business, the convenience of the public and the welfare of the railroad demanded its removal" was held to constitute a fair compliance with a covenant to operate and maintain a station on a specific lot of land conveyed for that purpose.

The court in *Scheller* v. *Tacoma R. & Power Co.,* 108 Wash. 348, 354, 184 Pac. 344, 346, followed the rule laid down in *Texas & Pac. Ry. Co.* v. *Marshall, supra,* and held that the operation of a railroad for twenty-five years was a substantial compliance with a contract whereby certain lands were deeded to the railroad company in return for its promise to build and operate a railroad between certain points and the State of Washington. The court points out that the contract did not impose upon the railroad company the duty of operating the railroad in perpetuity.

In *Littlerock & Ft. S. R. Co.* v. *Birnie,* 59 Ark. 66, 81, 26 S.W. 528, 531, the question was whether the maintenance of a depot for eleven years was a sufficient compliance with a covenant contained in a grant of certain lands wherein the railroad company agreed to erect and maintain a depot on said lands. The court said it was for the

jury to say whether the time was reasonable in the sense that it gave the plaintiff full opportunity to substantially realize the benefits that at the time of the donation it reasonably had expected to accrue to it.[3]

In the light of the foregoing authorities it is submitted:

1. That in the absence of any specification of the time during which the County of Alameda was to operate, maintain, repair and rebuild the Fruitvale Avenue Bridge in return for the revocable license to control the same, it must be assumed that a reasonable time was intended.

2. That the operation, maintenance and repair of the Park Street and High Street bridges from 1913 to the date of their replacement and the operation, maintenance and repair of the Fruitvale Avenue Bridge for a period of over twenty-seven years at a cost of more than seven hundred thousand dollars, was a reasonable time for the County of Alameda to continue its obligation and was a substantial compliance with the terms of the 1909 and 1913 resolutions of the board of supervisors of Alameda County and with the conditions set forth in the revocable license of the United States Government of 1910.

C. A Contract Which Specified No Time For Its Continuance Was Terminable At the Will of Either Party.

Contracts which do not specify any particular time for which an obligation is to continue have been construed as either having been substantially performed after a reasonable time, as discussed in the foregoing section, or as being terminable at the will of either party after reasonable notice.

In *Risley* v. *City of Utica* (C.C.N.D. N.Y. 1910) 179 Fed. 875, 885, the plaintiff contended that according to a contract he was bound to furnish water for the city and

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3. An annotation in 7 American Law Reports page 817 lists numerous other cases to the effect that performance for a reasonable time is substantial compliance with a contract where no specific time is stated.

that in return the city was bound to pay $10,000 annually and also part of the company's taxes. The court stated:

"The company did not agree to supply water for any length of time, but the city agrees to pay at the rate and on the basis stated so long as the company supplies water. . .

"I have no doubt that the city of Utica, . . . may terminate such contract on giving due and reasonable notice of its election so to do. It is not a contract that can be enforced in perpetuity by either party. There is no word or clause in it that binds the company to continue to furnish water under it, and I do not think the city could compel specific performance for all time. Neither can the company. It is not mutually enforceable. Its continuance is optional, but to terminate same notice must be given and a reasonable time fixed when such termination shall take effect. . .

"In 3 Page on *Contracts,* p. 2110, sec. 1361, it is said:

" 'If no time is fixed by the contract for its duration, and the contract from its nature is one which might last indefinitely, either party may at his option terminate such contract. . . A reasonable notice of the exercise of such option must be given,' etc."

In *Childs* v. *City of Columbia,* 87 S.C. 566, 572, 70 S.E. 296, 298, the court said:

". . . there is no allegation whatever that the plaintiff was bound to take, or that the city was bound to furnish, water for any specified time. Where the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from the circumstances surrounding them, it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually. In such a case the courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other."

So too in *Mass. Bonding & Ins. Co.* v. *Simonds,* 226 Mo. A. 1071, 1078, 49 S.W. (2d) 645, 648, the court stated:

> "A contract will be construed to impose an obligation in perpetuity only 'when the language of the agreement *compels* that construction.' . . . The general rule is that an agreement, which neither expressly nor by implication has any time fixed for it to expire, is terminable at the will of either party." [4]

If the appellant's theory is correct that the consideration for the operation and maintenance of the bridges was the revocable license granted by the federal government for the control of said bridges by Alameda County, then the contract is unenforceable because of lack of mutuality. If, however, we assume for the sake of argument only that the Government's theory is correct and that the establishment of harbor lines, the opening of the land to leasing and the electrification of the bridges was the consideration, then the equities are still with the appellant, for the establishment of the harbor lines and the leasing of the land were not only revocable at the will of the Government but were actually revoked in or before 1929. Furthermore the cost of the electrification was $22,000 or less, whereas the County of Alameda has expended over $700,000 in operating the bridges to date. It must be conceded that the Government received many times the benefit which it contemplated or even dared hope for. There can be no question that Alameda County has continued its obligation for a long enough time to fully compensate the Government for any expenditure it might have made.

The alleged license agreement is identical on its facts with those referred to in the foregoing cases and on the

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4. Accord: *Joliet Bottling Co.* v. *Joliet Citizens' Brewing Co.,* 254 Ill. 215, 219, 98 N.E. 263, 265; *Victoria Limestone Co.* v. *Hinton,* 156 Ky. 674, 676, 161 S.W. 1109, 1110; *Dunn* v. *Birmingham Stove & Range Co.,* 170 Okla. 452, 453, 44 P. (2d) 88, 89; *McCullough-Dalzell etc. Co.* v. *Philadelphia Co.,* 223 Pa. 336, 342, 72 Atl. 633, 636; *Bailey* v. *S. S. Stafford, Inc.,* 166 N.Y. Supp. 79, 82; *Cronk* v. *Vogt's Ice Cream, Inc.,* 15 N.Y. Supp. (2d) 649, 652.

basis of their authority it is submitted that it was terminable at the will of either party upon reasonable notice to the other and hence was terminated by the written notice of the board of supervisors dated September 28, 1939 addressed to the United States Government and notifying it that at midnight on December 31, 1939 the County of Alameda would cease to operate Fruitvale Avenue Bridge.

It is a well established rule of law that equity will not undertake to enforce a contract extending into perpetuity. In other words equity will not undertake to supervise the specific performance of a contract such as the one here under discussion extending over a term of years and involving a mass of detail in its execution.

This rule was expressed by the United States Supreme Court in *Texas & Pacific Ry. Co.* v. *Marshall,* 136 U.S. 393, 405, 406, 34 L. ed. 385, 390, 10 Sup. Ct. 846, 849, wherein the Court said:

> "But we are further of opinion, that if the contract is to be construed as the appellant insists it should be construed, it is not one to be enforced in equity. We have already shown that to decree the specific enforcement of this contract is to impose upon the company an obligation, without limit of time, to keep its principal office of business at the city of Marshall, . . .
>
> "It appears to us that if the city of Marshall has under such a contract a remedy for its violation, it is much more consonant to justice that the injury suffered by the city should be compensated by a single judgment in an action at law, and the railroad placed at liberty to follow the course which its best interests and those of the public demand. . .
>
> ". . .
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> ". . . It (the court) must be liable to perpetual calls in the future for like enforcement of the contract, and it assumes, in this way, an endless duty, inappropriate to the functions of the court, which is as ill-calculated to do this as it is to supervise and enforce a contract

for building a house or building a railroad, both of which have in this country been declared to be outside of its proper functions, and not within its powers of specific performance."

The potential amount of litigation involved in specifically enforcing the performance of a contract such as the one at bar would be even greater than that in *Texas & Pacific Ry. Co.* v. *Marshall, supra.* The following facts indicate the complexity of the contract herein sought to be specifically enforced:

1. That the bridge extends over navigable waters owned by the United States and hence subject to the control of the federal government for all time to come;
2. That the actual title to the bridge and the land under the bridge is in the federal government.
3. That the United States Government has established a naval base in the city of Alameda and that the Fruitvale Avenue bridge furnishes the only means whereby supplies may be carried by rail to that base, making the maintenance of that bridge a matter of vital and ever increasing importance to the government.
4. That the bridge is used not only for vehicular but for railroad purposes and that the Southern Pacific Company has a perpetual right of way over said bridge.
5. That the license specifically provides that a franchise shall not be exclusively granted to any one railroad company.
6. That the bridge is operated by the County of Alameda between two cities, namely, Oakland and Alameda, and that the needs and demands of said cities are constantly growing and changing.

In an annotation in 68 American State Reports 753, 755, the annotator states:

"There are two classes of cases in which, in a suit for the specific performance of a contract, equity will refuse to grant a decree, although there is no question

as to the validity, certainty, mutuality, or justice of the contract, and although there is no doubt that the defendant is entirely able to, and in all justice should, perform his contract. . . The second class, . . . embraces the numerous cases in which, by reason of the nature of the thing contracted to be done, a decree of specific performance must prove an ineffective or inexpedient remedy. . . Accordingly, where the enforcement of a decree of specific performance would unduly tax the attention and superintendence of the court; where it would necessitate the compelling of personal acts involving the exercise of special skill, taste, or judgment; where the performance of the contract must stretch over a considerable time; where the contract is so complex in its nature that it would be difficult in any case to determine whether an alleged disobedience of the court's decree was in fact a disobedience, . . . in all these cases, by the general rule, a decree of specific performance will be refused. . .

". . . Specific performance of a contract will not be decreed where the contract is perpetual: *Texas etc. Ry. Co.* v. *Marshall,* 136 U.S. 393; *McCarter* v. *Armstrong,* 32 S.C. 203. . .

"Perhaps the most important subdivision of the class of cases under consideration is that of building and construction contracts. . .

"The most interesting and important cases in this connection are those growing out of contracts for the construction, operation, and repair of railroads. Many of these contracts are most intricate and complex in their provisions, and extend their performance over long periods of time. Perhaps the leading case of this sort in the United States is that of *Ross* v. *Union Pac. Ry. Co.,* 1 Woolw. 26. . . ."

In *Ross* v. *Union Pac. Ry. Co.,* 20 Fed. Cas. p. 1245, 1250, Mr. Justice Miller said:

". . . I am inclined to concur fully with Judge Story, that 'in cases of contract to build a house or a bridge'

or I will venture to add, a railroad, 'a specific performance would not now be decreed'. 2 Story eq Jur. Sec. 716, Note 2.

". . . And this (the continuous and complicated nature of work to be done) may have been a reason, and a very strong reason, for the rule, now well settled, that a covenant to repair will not be specifically enforced." [5]

An alleged license agreement such as the one now before this court extending over an indefinite and uncertain period of time and purporting to bind the County of Alameda to operate, maintain, repair and if necessary rebuild the Fruitvale Avenue Bridge under the supervision of the Engineer's Office of the United States Army presents a situation more complex and uncertain than that presented in any of the foregoing cases where the courts have denied specific performance.

The prayer of the Government should therefore be denied.

V.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH V OF "CONCLUSIONS OF LAW" THAT "CONGRESS HAD AND HAS POWER TO AUTHORIZE THE COUNTY TO OPERATE, MAINTAIN, REPAIR AND REBUILD THE FRUITVALE AVENUE BRIDGE" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE CONGRESS OF THE UNITED STATES HAS NOT NOW, AND NEVER HAS HAD THE POWER TO AUTHORIZE SAID COUNTY OF ALAMEDA TO OPERATE, MAINTAIN, REPAIR OR REBUILD SAID FRUITVALE AVENUE BRIDGE (APPENDIX p. xxxii).

Municipal corporations have only such powers as are expressly conferred by the constitution or statutes of the state or as are necessarily incident to those expressly

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5. Accord: *Long Beach Drug Company* v. *United Drug Company*, 13 Cal. (2d) 158, 171, 88 P. (2d) 698, 704; *York Haven Water & Power Co.* v. *York Haven* (C.C.A. 3rd 1912) 201 Fed. 270, 278; *United Cigarette Machine Co.* v. *Winston Cigarette Machine Co.*, (C.C.A. 4th 1912) 194 Fed. 947, 958.

granted or are essential to the declared objects and purposes of the municipal corporation.

Egan v. *San Francisco,* 165 Cal. 576, 582, 133 Pac. 294, 296; *Hurst* v. *City of Burlingame,* 207 Cal. 134, 138, 277 Pac. 308, 311; *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 146, 89 P. (2d) 460, 465; *In re Valley Deposit and Trust Co.,* 311 Pa. 495, 497, 498, 167 Atl. 42, 43; *Utah Rapid Transit Co.* v. *Ogden City,* 89 Utah 546, 550, 58 P. (2d) 1, 3; *Mineral County Court* v. *Town of Piedmont,* 72 W. Va. 296, 298, 78 S.E. 63; and 1 Dillon, *Municipal Corporations* (5th ed.) sec. 237.

Political subdivisions of a state are created to carry on certain functions which, though limited in their scope, are in their performance as much an exercise of sovereignty as when the corporate state itself exercises its universal sovereignty. As was said in the *City of Bisbee* v. *Cochise County,* 52 Ariz. 1, 13, 78 P. (2d) 982, 986:

> ". . . These subordinate bodies are created by virtue of the sovereignty resting in the state; they draw all their powers from that sovereignty, and *are created for the sole purpose of exercising the limited part of sovereignty delegated to them.* We cannot conceive of a county, a municipal corporation, or a school district as exercising any functions whatever except by right of such delegated sovereignty, and it is solely for the purpose of promoting the common weal of its citizens, either of the state as a whole or of the particular subdivision thereof in question, that such power is delegated."

The United States Supreme Court has on innumerable occasions said that the powers of the general government are only those specifically enumerated in the Constitution and such implied powers as are necessary and proper to carry into effect the enumerated powers. The Tenth Amendment to the Constitution expressly declares: "The powers not delegated to the United States by the Consti-

tution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Nowhere in the Constitution of the United States is Congress given authority to bestow powers on a subdivision of a state or to enlarge the express powers of such subdivision or to nullify an express limitation which the state has imposed upon the power of such subdivision. The state is sovereign within its own sphere of jurisdiction.

In *Ashton* v. *Cameron County District,* 298 U. S. 513, 528, 531, 80 L. ed. 1309, 1312, 1314, 56 Sup. Ct. 892, 895, 896, the United States Supreme Court in holding unconstitutional the amendment to the Bankruptcy Act extending the benefits of the act to political subdivisions of the state on the ground that the amendment encroached upon state powers stated:

> ". . . Its fiscal affairs are those of the state, not subject to control or interference by the national government, unless the right so to do is definitely accorded by the Federal Constitution.
>
> ". . .
>
> "Neither consent nor submission by the states can enlarge the powers of Congress; none can exist except those which are granted. *United States* v. *Butler,* 297 U. S. 1 . . . The sovereignity of the state essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation. See *United States* v. *Constantine,* 296 U. S. 287 . . .
>
> "Like any sovereignty, a state may voluntarily consent to be sued; may permit actions against her political subdivisions to enforce their obligations. Such proceedings against these subdivisions have often been entertained in federal courts. But nothing in this tends to support the view that the federal government, acting under the bankruptcy clause, may impose its will and impair state powers—pass laws inconsistent with the idea of sovereignty."

In *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 294, 80 L. ed. 1160, 1180, 56 Sup. Ct. 855, 865, Justice Sutherland said:

> ". . . While the states are not sovereign in the true sense of that term, but only *quasi*-sovereign, yet in respect of all powers reserved to them they are supreme—'as independent of the general government as that government within its sphere is independent of the States.' *Collector* v. *Day,* 11 Wall. 113, 124. . . It is no longer open to question that the general government, unlike the states, *Hammer* v. *Dagenhart,* 247 U. S. 251, 275, possesses no *inherent* power in respect of the internal affairs of the states; and emphatically not with regard to legislation . . .
>
> "The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other. . ."

A county or other political subdivision of a state derives none of its powers from the United States and the mere fact that such subdivision attempts to enter into an alleged contract with the federal government which is beyond the power granted to it by the state does not automatically increase the county's power to execute such agreement.

In *Arkansas-Missouri Power Co.* v. *City of Kennett, Mo.,* (C.C.A. 8th, 1935) 78 F. (2d) 911, 922, the court said:

> ". . . The city derives none of its powers from the United States. It is a creature of the state of Missouri and has only such powers as the state has given it. The relation of the United States to the City is no different than would be the relation to it of any individual, cor-

poration, foreign state, or foreign sovereignty which had made a similar arrangement for financing the city with respect to the construction of public works. If the city could lawfully enter into this agreement with the United States, we think it could lawfully have entered into a similar agreement with any entity having power to contract."

So in *State ex rel. Cole* v. *Keller,* 129 Fla. 276, 286, 287, 288, 176 So. 176, 180, the court said:

"We find no authority on the part of the city to impose such a tax. It is not within the budgetary requirements of the city and is shown to be an attempt to raise and expend tax funds for a purpose not contemplated by the annual budget . . .

". . .

". . . The Legislature is the source of the municipalities' power, and such as does not flow from it is not vested . . .

". . .

"The law seems settled that the Federal Government through agencies provided by it may make loans to a county or municipality to construct or aid in the construction of municipal or county projects. *Greenwood County* v. *Duke Power Company* (C.C.A.) 81 F. (2d) 986, but such a power does not, *sua sponte,* clothe the county or municipality with authority to contract with the Federal Government or its agencies. Such contracts must be made in the same manner and under the same authority as contracts with individuals. *Arkansas-Missouri Power Company* v. *City of Kennett* (C.C.A.) 78 F. (2d) 911."

Congress has no power to amend state legislation (*Public Service Com'n.* v. *New York Cent. R. Co.,* 185 N.Y. Supp. 267, 271, 274, 194 App. Div. 254).

It therefore follows that the district court's conclusion of law that Congress had and has power to authorize the County of Alameda to operate, maintain, repair and rebuild the Fruitvale Avenue Bridge, not in furtherance of

any power expressly or impliedly granted to said county by the constitution or statutes of the State of California or the charter of said county but in derogation of the express prohibition of section 31 or article IV of the state constitution, prohibiting a county from making a gift of public money to any private person or corporation, and of section 18 of article XI of said constitution, providing that no county shall incur any indebtedness for any purpose exceeding in any year the income and revenue provided for such year without the consent of two-thirds of the qualified voters thereof, is obviously erroneous.

VI.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH III OF "CONCLUSIONS OF LAW" THAT "THE COUNTY OF ALAMEDA IS NOW ESTOPPED TO SET ASIDE ITS CONTRACT WITH THE UNITED STATES TO MAINTAIN, OPERATE, REPAIR AND REBUILD FRUITVALE AVENUE BRIDGE" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE ALLEGED CONTRACT WAS ULTRA VIRES AND THAT THE SAID COUNTY OF ALAMEDA IS NOT NOW AND NEVER HAS BEEN ESTOPPED TO SET ASIDE SAID ALLEGED CONTRACT (APPENDIX p. xxxi).

In other sections of this brief the appellant has established that the alleged license agreement was *ultra vires* and void for each of the following reasons:

1. The County of Alameda and its board of supervisors were without constitutional or statutory power, express or implied, to execute the same (App. Br. 16-29);

2. Section 18 of Article XI of the California Constitution expressly prohibits said county from incurring the liability contemplated thereunder which was in excess of the year's income (App. Br. 29-41);

3. Section 31 of Article IV of the California Constitution and the due process clause of the United States Constitution prohibts said county from making the gift

therein provided of its tax moneys to a private railroad corporation or the United States (App. Br. 42-54); and

4. Said county and its board of supervisors were prohibited from entering into a perpetual contract (App. Br. 54-75).

We therefore submit that neither the County of Alameda nor its board of supervisors was acting within the scope of its authority when in 1909 and 1913 said county or said board adopted resolutions concerning the operation, maintenance, repair and replacement of the Fruitvale Avenue Bridge and that therefore the doctrine of equitable estoppel has no application to the alleged license agreement.

The Supreme Court of California has consistently held that neither the state nor a political subdivision thereof is equitably estopped to deny the validity of a contract or agreement which was beyond it power to execute.[1]

In *Los Angeles Dredging Co.* v. *Long Beach,* 210 Cal. 348, 353, 291 Pac. 839, 842, the court stated:

> "Certain general principles have become well established with respect to municipal contracts, and a brief statement of these principles will serve to narrow the field of our inquiry here. The most important one is that contracts *wholly beyond the powers of a municipality are void. They cannot be ratified; no estoppel to deny their validity can be invoked against the municipality;* and ordinarily no recovery in *quasi* contract can be had for work performed under them. . ." (Emphasis added.)

In *Wichmann* v. *City of Placerville,* 147 Cal. 162, 164, 81 Pac. 537, 538, the court stated:

> "The proposition that charters of municipal corporations are special grants of power from the sovereign authority and are to be strictly construed, and that

1. *Berka* v. *Woodward,* 125 Cal. 119, 122, 57 Pac. 777, 779; *Foxen* v. *City of Santa Barbara,* 166 Cal. 77, 81, 134 Pac. 1142, 1143; *Reams* v. *Cooley,* 171 Cal. 150, 153, 152 Pac. 293, 294; *City of Pasadena* v. *Estrin,* 212 Cal. 231, 235, 298 Pac. 14, 15; *County of Shasta* v. *Moody,* 90 Cal. App. 519, 523, 265 Pac. 1032, 1034; and *Miller* v. *City of Martinez,* 28 Cal. App. (2d) 364, 370, 82 P. (2d) 519, 523.

whatever power is not given expressly, or as a necessary means to the execution of expressly given powers, is withheld, is a proposition too well settled to call for discussion. (*Douglas* v. *Mayor of Placerville,* 18 Cal. 645.) Equally well settled is it that want of power is always a defense to a municipal corporation, and that no estoppel, by conduct or by ratification, to raise the question of want of power, can be urged against such corporation. This last is a rule of necessity. . . ."

The danger of applying the rule of estoppel to contracts which are beyond the power of a county or a municipal corporation to make was pointed out in *City of Arcata* v. *Green,* 156 Cal. 759, 764, 106 Pac. 86, 88, wherein the court stated:

". . . A party contracting with a city regarding a subject-matter within the scope of the city's powers may, where he has received the benefit of the contract, be precluded from asserting that the contract was not, on the part of the city, executed in the manner required by law. The doctrine, however, cannot be made to cover contracts *entirely beyond the range of the municipal authority.* 'If this doctrine be established, then corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature has withheld. A proposition so erroneous can scarcely need argument to overturn it . . . We cannot apply the doctrine of estoppel to such a case as this.' (*City Council* v. *Montgomery etc. Co.,* 31 Ala. 76.)"

Numberous recent cases from other jurisdictions might be cited in support of the foregoing propositions.[2]

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2. *Town of Conway* v. *Atlantic Coast Line R. Co.,* (D.C., E.D.S.C., 1926) 20 F. (2d) 250, 257; *Hoskins* v. *City of Orlando,* (C.C.A. 5th 1931) 51 F. (2d) 901, 904; *Hope* v. *City of Alton,* 214 Ill. 102, 106, 73 N.E. 406, 407; *American Oil Co.* v. *Marion County,* 187 Miss. 148, 158, 192 So. 296, 299; *In re Rosa's Estate,* 16 N.Y. Supp. (2d) 285, 288, 172 Misc. 808.

A number of cases might be cited to the effect that a court of equity will not enforce an alleged contract which violates a debt limitation provision of the state constitution and that there is no estoppel on the part of the state or of its political subdivision to deny the validity of such a contract.

The Supreme Court of the United States in *District Township of Doon* v. *Cummins,* 142 U.S. 366, 371, 375, 376, 35 L. ed. 1044, 1046, 1047, 1048, 12 Sup. Ct. 220, 221, 223, stated:

> "The scope and meaning of this provision of the fundamental and paramount law of the state are clear and unmistakable. No municipal corporation 'shall be allowed' to contract debts beyond the constitutional limit. When that limit has been reached, no debt can be contracted 'in any manner or for any purpose.' . . .
>
> ". . .
>
> "The constitution of Colorado of 1876, art. 11, sec. 6, provides that the indebtedness contracted in any one year, by any county . . . shall not exceed a certain per cent on its assessed valuation, and that 'the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited.' This court held in *Lake Co.* v. *Rollins,* 130 U. S. 662, that this provision limited the power of the county to contract debts for any purpose whatever; and in *Lake County* v. *Graham,* 130 U. S. 674, that the county was not estopped, as against a *bona fide* holder for value, to show that the constitution had been violated by issuing bonds . . .
>
> "It is hardly necessary to add that the payment of some installments of interest cannot have the effect of ratifying bonds issued beyond the constitutional limit; for a ratification can have no greater effect than a previous authority; and debts which neither the dis-

trict nor its officers had any power to authorize or create cannot be ratified or validated by either of them, by the payment of interest, or otherwise. . ." [3]

In the recent case of *Cameron County Water Improvement Dist. No.* 8 v. *De La Vergne Engine Co.* (C.C.A. 5th 1937) 93 F. (2d) 373, 375, 376, the court in denying the right of the plaintiff to recover the purchase price of machinery for which an expenditure was made in excess of the debt limitation clause of the Texas constitution, stated:

"The appellee relies strongly upon ratification and estopel; but neither may be invoked to enforce a contract entered into in violation of a constitutional provision which was intended to safeguard taxpayers against such financial difficulties as now envelop this improvement district by reason of its having ignored the statutory scheme requiring it either to sell the bonds and purchase equipment for cash, or to exchange them for property. . .

". . . we have pointed out that these plain requirements of the Constitution and laws of the state are for the security of the taxpayers, and courts are not at liberty arbitrarily to set them aside where the district has received the benefits of a contract which it had no power to make . . . *Hughson* v. *Crane,* 115 Cal. 404, 47 P. 120; *Litchfield* v. *Ballou,* 114 U. S. 190, 5 S. Ct. 820, 29 L. Ed. 132; . . .

". . . Fundamental laws to correct evils, made upon great deliberation and in the most solemn manner, should not be evaded by strained and overlearned refinements, but should be liberally construed with the evils in mind which were intended to be corrected."

The California Supreme Court in *Higgins* v. *San Diego Water Company,* 118 Cal. 524, 554, 555, 45 Pac. 824, 831,

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3. Accord: *Dixon County* v. *Field,* 111 U.S. 83, 89, 92, 28 L. ed. 360, 362, 363, 4 Sup. St. 315, 317, 318; *Hedges* v. *Dixon County,* 150 U. S. 182, 192, 37 L. ed. 1044, 1048, 14 Sup. Ct. 71, 73; *Gillette-Herzog Mfg. Co.* v. *Canyon County* (C.C.D. Idaho C.D. 1898) 85 Fed. 396, 398; and *McAleer* v. *Angell,* 19 R.I. 688, 694, 36 Atl. 588, 590.

832, specifically held that a city was not estopped to deny the validity of a contract, even so far as executed, which contract provided for an indirect subsidy to a private railroad in violation of section 31 of article IV of the California Constitution, in spite of the fact that the city had required the water company, in pursuance of the terms of the alleged contract, to expend more than $100,000 for improvements.

The appellant has previously discussed the proposition that equity will not decree specific performance of a perpetual contract (App. Br. pp. 72-75).

In view of the foregoing authorities it is submitted that the purported contract between the United States and the County of Alameda was *ultra vires* and void and that the County of Alameda could not at any time have ratified the contract and is not now, and never has been estopped to deny the validity of the alleged agreement, particularly in view of the fact that the amount expended by the Government, to wit, the sum of $21,000, for the electrification of the bridges (Tr. 135, 263) has been repaid by the County of Alameda thirty-four times during the past twenty-seven years.

VII.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH VIII OF "CONCLUSIONS OF LAW" THAT "THE CONTRACT BETWEEN THE UNITED STATES AND THE COUNTY OF ALAMEDA IS NOT VOID FOR LACK OF MUTUALITY" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE ALLEGED CONTRACT BETWEEN THE UNITED STATES AND THE COUNTY OF ALAMEDA WAS VOID FOR LACK OF MUTUALITY (APPENDIX p. xxxiii).

If the negotiations between the United States Government and the County of Alameda between the years 1909 and 1913 constitute a contract and not a mere license, as the appellant contends, then the resolution of 1909 must

be construed as an offer, the license of 1910 as a counter offer and hence as a rejection of the offer of 1909, and the resolution of 1913 as an acceptance of said counter offer, and the three documents collectively must be considered as the constituent parts of a bilateral executory contract. The consideration for the execution of the alleged contract by the County of Alameda was the Government's granting to the county the control of the three bridges.

The 1910 license made no reference to the establishment of harbor lines nor to the leasing of the waterfront (Tr. 170). The 1909 resolution states that the county agrees to accept the bridges "provided that they and each of them be placed in such condition and repair by the United States of America prior to such acceptance by the said County of Alameda, in the State of California, that said bridges and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks." (Tr. 168-169).

The 1913 resolution of the board of supervisors in its preamble refers to the above quoted language of the prior resolution of 1909 but the acceptance of the bridges and the assumption of their control is subject, not to the conditions set forth in the resolution of 1909 but "to the conditions and provisions of the aforesaid license of September 3, 1910." (Tr. 175).

Thus it is seen that the ultimate agreement, if any, was not to be bound by the terms contained in the original offer of 1909 but by the terms contained in the counter offer of the Government as set forth in the license of 1910; that said license did not refer to harbor lines nor leases; that the Government was therefore not bound either to establish harbor lines nor to lease the water front of the Tidal

Canal; that if it had done so, it reserved the right to do so "under such terms and conditions as it might see fit" which meant to do nothing if it so "saw fit", and also that it reserved the right to revoke such harbor lines and leases at will, a right which it actually exercised prior to 1929 (Tr. 446). The consideration for the county's promise to operate, maintain, repair and rebuild the bridges, if any, is therefore whittled down to one of two things: the electrification of the bridges and/or the license to control the same.

That the electrification was not the consideration is conclusively established by the documents themselves. The operative part of the license of 1910 reads in part as follows:

> ". . . the Secretary of War hereby grants unto THE BOARD OF SUPERVISORS OF ALAMEDA COUNTY, CALIFORNIA, A LICENSE revocable at will be the Secretary of War . . .
>
> "THIS LICENSE is granted subject to the following conditions and provisions:"
>
> ". . .
>
> "3.—That the United States shall put all three bridges in condition for operation of their draws by electrical power, . . ." (Appendix p. ——).

Note the language: The Secretary of War hereby *grants* unto the board of supervisors of Alameda County, California, a license . . . subject to the following conditions and provisions. The third provision is that the United States Government shall electrify the bridges. Under what theory of reasoning may we conclude that this condition was any different than the four other conditions upon which the license was granted? Upon what theory are we justified in considering that the third condition is the object rather than an incident of the contract?

Suppose A agrees to grant to B in fee certain real property and the improvements and appurtenances thereon for

the sum of ten thousand dollars and as an added inducement agrees to paint the barn on said property before possession is delivered. Later it develops that A owns only an estate for years in the property and B therefore refuses to go through with the contract. A sues B for the purchase price of the property and B sets up the defense that A's estate is not an absolute one. A counters with the reply that though the estate is not one in fee, still he has painted the barn at a cost of approximately one hundred dollars. Would any court of equity decree the specific performance of such a contract by B? It is obvious that such a defense would be frivolous for it is apparent on its face, first, that the parties did not intend that the painting of the barn should be the consideration for the purchase price of ten thousand dollars and, secondly, that the painting of the barn is of no benefit to B unless he can enjoy absolute possession of the realty, including the incidental condition that the barn be in good repair.

In the instant case, the electrification of the bridges was a mere incident of the contract, a minor stipulation subordinate to the real object for which the contract was entered into, to wit, the control of the bridges by the County of Alameda. Had the County of Alameda merely wanted to have the bridges operated by electricity, it does not seem reasonable to suppose that it would have been willing to pay over $700,000 plus all the future costs involved, for work costing a paltry sum of $21,000. It is only reasonable to suppose that the county would rather have sought to bind the government to an agreement whereby the county would have paid the cost of electrifying the bridges and the federal government would have continued to operate, maintain, repair and rebuild the same as it was already bound to do by the decision in the *Crooks* case. The County of Alameda was seeking the right to control the bridges so as to operate them in a manner best

suited to the needs of two rapidly growing industrial cities —Oakland and Alameda—without interference from any other governmental agency. This was the conclusion of the District Court of Appeal in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 146, 89 P. (2d) 460, 465, when it stated:

> "There is no merit in the petitioner's contention that the installation of electrical apparatus by the government for the opening and closing of the draw-bridges, under the terms of the license prior to its execution, furnishes an independent consideration which makes the agreement binding. It still lacks mutuality. . ."

The license was the grant of a privilege to Alameda County to remove an obstruction to navigation caused by the Park Street, High Street and Fruitvale Avenue Bridges. That such obstruction existed did not mean that the Tidal Canal was not navigable in its natural state nor prior to 1913 or was not capable of being made navigable. It did mean that navigation was hindered and delayed by three cumbersome and antiquated bridges which could only be opened at great expense and after a long delay. This control of the bridges and the right to operate them for the benefit of the county was the consideration, and the sole consideration, which the county was seeking in its original offer of 1909 and for which it agreed to be bound by the resolution of 1913.

However, the right to control the bridges as set forth in the grant from the War Department is subject to revocation at the will of the Secretary of War. In other words, the grant of the authority over the bridges might be revoked at any time without cause. Whereas it may be assumed that the government would not revoke the license without some good reason, the fact remains that the determination of what constitutes a good reason was solely within the discretion of the government and should the license be revoked at any time for any or no cause,

the county would be entirely without legal redress. It is submitted that such an alleged contract subject to revocation by one party at will is lacking in mutuality, is without consideration and is therefore void.

In 1 Williston on Contracts (Rev. ed. 1936) commencing at page 123 section 43 it is stated:

> "One of the commonest kind of promises too indefinite for legal enforcement is where the promisor retains an unlimited right to decide later the nature or extent of his performance. This unlimited choice in effect destroys the promise and makes it merely illusory. . .
>
> ". . . But a promise to give anything whatever which the promisor may choose, or to do or give something whenever the promisor pleases, is illusory, for such promises would be satisfied by giving something so infinitely near nothing or by performance so infinitely postponed as to have no calculable value. For the same reason if one party to an agreement reserves an unqualified right to cancel the bargain no legal rights can arise from it while it remains executory. . ."

Page 352 section 104 reads:

> ". . . And in any case where a promise in terms or in effect provides that the promisor has a right to choose one of two alternatives, and by choosing one will escape without suffering a detriment or giving the other party a benefit, the promise is insufficient consideration. The same consequence follows where a bilateral agreement in question expressly reserves to one party the right of immediate cancellation at any time. . ."

Page 365 section 105 further said:

> ". . . That a promise which in terms reserves the option of performance to the promisor is insufficient to support a counter-promise is well settled. And the promise is no more effectual because the condition contained in it is in the form a condition subsequent rather than a condition precedent. As has been seen an agree-

ment which one party reserves the right to cancel at his pleasure cannot create a contract."

The above language is quoted in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 145, 89 P. (2d) 460, 464. There the court said:

". . . In the present case there is an absolute absence of mutuality for the reason that the government may cancel the agreement and deprive the County of Alameda of the use or control of the bridges at any moment without cause. In 13 Corpus Juris, page 337, section 188, it is said:

" 'Where one party reserves an absolute right to cancel or terminate the contract at any time mutuality is absent. . .' . . .

". . . A careful reading of the document leaves no doubt it was the intention of the government, clearly expressed in unequivocal language, that it reserves the absolute right to revoke the license at will with or without cause. It contains no limitation whatever upon that arbitrary power. It is therefore void for lack of mutuality and for lack of consideration."

The federal courts have closely adhered to the foregoing well established statements of the law. The United States Supreme Court in *Marble Co.* v. *Ripley,* 10 Wall. 339, 359, 19 L. ed. 955, 962, said:

"Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way

might in itself be free from the difficulty attending its execution in the former."

In *Southern Express Co.* v. *Railroad Co.,* 99 U. S. 191, 200, 25 L. ed. 319, 321, the court said:

"But we need not pursue the subject further, because there is one provision of the contract in this case which is fatal to the relief sought. A court of equity never interferes where the power of revocation exists. . ."

In *Willard, Sutherland & Co.* v. *United States,* 262 U.S. 489, 493, 67 L. ed. 1086, 1088, 43 Sup. Ct. 592, the Supreme Court of the United States held that a contract wherein it was provided that "it shall be distinctly understood and agreed that . . . the contractor will furnish and deliver any quantity of the coal specified . . . which may be needed . . . irrespective of the quantity stated, *the government not being obligated to order any specific quantity.* . ." was void for lack of mutuality and consideration.[1]

In numerous other federal cases the courts have held that contracts containing cancellation clauses were void for lack of mutuality.[2]

A number of the foregoing authorities were cited in the case of *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 141-145, 89 P. (2d) 460, 462-465, wherein the court had before it the same documents which are now be-

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1. The same rule was laid down in *William C. Atwater & Co. Inc.* v. *United States,* 262 U.S. 495, 498, 67 L. ed. 1089, 1090, 43 Sup. Ct. 595, 296.

2. *Cold Blast Transportation Co.* v. *Kansas City Bolt & Nut Co.,* (C.C.A. 8th 1902) 114 Fed. 77, 79; *Velie Motor Car Co.* v. *Kopmeier Motor Co.,* (C.C.A. 7th 1912) 194 Fed. 324, 330; *Oakland Motor Car Co.* v. *Indiana Automobile Co.,* (C.C.A. 7th 1912) 201 Fed. 499, 503; *Ellis* v. *Dodge Bros.,* (D.C. N.D. Ga. 1916) 237 Fed. 860, 867; *City of Pocatello* v. *Fidelity and Deposit Co of Maryland,* (C.C.A. 9th 1920) 267 Fed. 181, 182; *Miami Coca-Cola Bottling Co.* v. *Orange Crush Co.,* (C.C.A. 5th 1924) 296 Fed. 693, 694; *Curtiss Candy Co.* v. *Silberman,* (C.C.A. 6th 1930) 45 F. (2d) 451, 452; *Ford Motor Co.* v. *Kirkmyer Motor Co.,* (C.C.A. 4th 1933) 65 F. (2d) 1001, 1003; *E. I. DuPont DeNemours & Co.* v. *Claiborne-Reno Co.,* (C.C.A. 8th 1933) 64 F. (2d) 224, 232; *Motor Car Supply Company* v. *General Household Utilities Co.,* (C.C.A. 4th 1935) 80 F. (2d) 167, 170; *Terre Haute Brewing Co.* v. *Dugan,* (C.C.A. 8th 1939) 102 F. (2d) 425, 427.

ing considered by this Court and where the court held that the contract was void for lack of mutuality and stated:

"We are of the opinion the license from the United States does not authorize the County of Alameda to incur indebtedness or to expend public money in repairing or maintaining that portion of the Fruitvale Avenue Bridge which is used exclusively for the benefit of the Southern Pacific Railroad Company, for the reason that the license is revocable at will by the Secretary of War and therefore lacks mutuality of obligations and consideration, which renders it void. . .

"The license in question is an executory agreement authorizing the County of Alameda to retain the use and operation of the estuary bridges for an indefinite length of time, subject, however, to the control of the Secretary of War, and absolutely revocable at his will without cause therefor. It is apparent from the terms of the license that the County of Alameda will soon be called upon to reconstruct the Fruitvale Avenue Bridge at an expense of approximately $1,250,000, immediately upon the completion of which the government mak revoke the agreement, appropriate the benefits of the vast expenditure of money by the county, and resume its exclusive operation and control of the bridges. Under the uniform authorities such an agreement is held to be void for lack of mutuality of obligations and for lack of consideration.

". . .

"The document, by the terms of which the government authorizies the operation and use of the bridges by the County of Alameda, appears to be a mere conditional license or privilege to use the bridges for the convenience of public traffic, which is revocable at the pleasure of the Secretary of War at any time with or without cause. . .

". . .

"The instrument in question is in the nature of a promise or agreement on the part of the government

to permit the County of Alameda to operate and use the bridges for public traffic. Since it contains an express provision that it may be revoked at will, it creates no vested interest in the County of Alameda, and therefore lacks mutuality of obligations and also lacks consideration necessary to render it binding. . .

". . .

"There is not the slightest intimation in the license which is involved in this proceeding that the government reserves the right to revoke the use and operation of the bridges only for 'good cause'. A careful reading of the document leaves no doubt it was the intention of the government, clearly expressed in unequivocal language, that it reserves the absolute right to revoke the license at will with or without cause. It contains no limitation whatever upon that arbitrary power. It is therefore void for lack of mutuality and for lack of consideration." [3]

It would be idle to further multiply citations for the well recognized rule of law that an unconditional right of cancellation of an alleged contract destroys mutuality and renders the contract void.

By this action the United States is seeking to compel the County of Alameda to continue to operate, maintain, repair and, if necessary rebuild the Fruitvale Avenue Bridge. If the United States can revoke the license at will, and it must be conceded that it can, since the right of revocation is expressly reserved in the license itself, then the County of Alameda can likewise terminate the arrangement for the continued operation and maintenance of the bridge at any time upon reasonable notice. The County of Alameda having notified the United States on the 28th of September, 1939 that at midnight on the 31st day of December, 1939 it would cease to operate the said Fruitvale Avenue

3. Accord: *Naify* v. *Pacific Indemnity Company*, 11 Cal. (2d) 5, 11, 76 P. (2d) 663, 667; *Hamlin* v. *Barnhart*, 26 Cal. App. 632, 633, 147 Pac. 1188, 1189; *Chas. Brown & Sons* v. *White Lunch Co.*, 92 Cal. App. 457, 461, 268 Pac. 490, 491; *Shortell* v. *Evans-Ferguson Corp.*, 98 Cal. App. 650, 659, 277 Pac. 519, 523.

Bridge, was entitled to withdraw from any further participation in said operation on the date specified.

It is respectfully submitted that in view of the foregoing facts and the law applicable thereto, that the District Court should not only have refused to grant the Government's prayer for specific performance but should have decreed that there is not now, and never has been any valid or enforceable contract or agreement whereby the County of Alameda was bound to operate, maintain, repair and if necessary rebuild said Fruitvale Avenue Bridge.

VIII.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH IX OF "CONCLUSIONS OF LAW" THAT "THE CONTRACT BETWEEN THE UNITED STATES AND THE COUNTY OF ALAMEDA IS NOT VOID FOR UNCERTAINTY" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE ALLEGED CONTRACT WAS VOID FOR UNCERTAINTY AND SHOULD HAVE REFUSED SPECIFIC PERFORMANCE OF THE SAME (APPENDIX xxxiv).

It must be remembered that the District Court by its decree of October 21, 1940 granted the Government's prayer for specific performance of the alleged contract and ordered, adjudged and decreed "that the defendant County of Alameda maintain, repair and operate Fruitvale Avenue Bridge at its sole cost and expense" and "that the County of Alameda rebuild said bridge at its sole cost and expense if the same should be burned, destroyed or become inadequate for the purpose it serves".

The appellant submits that the alleged contract is void for uncertainty, first because it provides that the license to control the bridges is revocable at the will of the Government, secondly because it contains no specification of time during which the county shall be bound to operate, maintain, repair and rebuild the bridges, and thirdly be-

cause the intent of the parties cannot be ascertained from the language of the documents constituting the alleged agreement and the court of equity should have refused to decree its specific performance.

The provision in the license from the Secretary of War to the effect that it is revocable all will is alone sufficient to render the contract void for lack of certainty. While it may be assumed that the Government would only revoke the license for good cause, there is no guagantee of such protection. For this reason the consideration, if any, is rendered valueless.

The most important element, that is, the time for which the consideration will continue, is left absolutely undetermined. From the earliest times the courts have held that where the duration of any contract is entirely within the will, whim or caprice of the promisor, such contract was vid for uncertainty.

In 1 Williston on *Contracts* (Rev. ed. 1936) 123, in discussing contracts which are void because the length of time for which either party is bound is subject to the will of the party, Mr. Williston states:

> "One of the commonest kind of promises too indefinite for legal enforcement is where the promisor retains an unlimited right to decide later the nature or extent of his performance. . ."

Section 1598 of the Civil Code of California provides:

> "Where a contract has but a single object, and such object is . . . so vaguely expressed as to be wholly unascertainable, the entire contract is void."

The object of the agreement was undoubtedly to secure to the county the control of the bridges but the length of time for which such control was given is wholly unascertainable from the terms of the contract.

In the case of *Corthell* v. *Summit Thread Co.,* 132 Me. 94, 99, 167 Atl. 79, 81, the plaintiff sued on a contract for

specific performance and for money damages. In declaring the contract void the court said:

> "There is no more settled rule of law applicable to actions based on contracts than that an agreement, in order to be binding, must be sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liability of the parties. Indefiniteness may relate to the time of performance, the price to be paid, work to be done, property to be transferred, or other miscellaneous stipulations of the agreement . . . And a reservation to either party of an unlimited right to determine the nature and extent of his performance renders his obligation too indefinite for legal enforcement, making it, as it is termed, merely illusory. . . See extended note, 53 L.R.A. 288, et seq.; . . ."

In *Chiapparelli* v. *Baker,* 252 N.Y. 192, 200, 169 N.E. 274, 277, the court said:

> "Where a promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is too indefinite for legal enforcement. The unlimited choice in effect destroys the promise and makes it merely illusory. . ."

Even assuming, for the sake of argument only, that the contract was not void for lack of mutuality and that the license was not the consideration for the execution of the agreement, the contract is still void for uncertainty because it is impossible from the language of the documents which constitute the contract, if any, to ascertain whether the county agreed to operate and maintain the bridge for all time to come, whether the period for which it bound itself was for more or less than twenty-seven years, or until it had expended more or less than thirty-four times the cost of the electrification of said bridges. The agreement now before this court is of the type which equity has consistently refused to order specifically performed.

The Supreme Court of California in the case of *Pascoe* v. *Morrison,* 219 Cal. 54, 58, 25 P. (2d) 9, 11, stated:

". . . It is settled that ' "a greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is the basis of an action at law for damages. An action at law is founded upon a mere nonperformance by a defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of nonperformance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms; they must be exactly ascertained before the nonperformance can be enforced." ' . . ." [1]

On the basis of the authorities hereinabove cited and those contained in the section discussing lack of mutuality (App. Br. 85-95) the appellant submits that the alleged contract in the instant case is void for uncertainty because of the indefinitness of the time for which the license was granted or for which the county was bound, and that the court committed error in ordering its specific performance.

There are other respects in which the alleged contract was so uncertain as to render it unenforceable in a court of equity.

In the Rivers and Harbors Act, approved June 25, 1910 (Tr. 8-9) it was provided that the three bridges heretofore built by the United States in connection with the improvement may be "turned over" to the local authorities, to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities. What is meant by the term "turned over"? The term has no recognized legal meaning and is too ambiguous and uncertain to be specifically enforced by a court of equity.

1. Accord: *Schimmel* v. *Martin*, 190 Cal. 429, 432, 213 Pac. 33, 34.

In *Scott* v. *Cline Electric Mfg. Co.,* 104 Cal. App. 122, 127, 285 Pac. 349, the promisor promised to "push the sale" of motors and the court held that the term "push the sale" was too uncertain and indefinite to constitute an enforceable consideration and there being no other promise or consideration on the part of the plaintiff, that the contract was void for uncertainty.

In *Blake* v. *Mosher,* 11 Cal. App. (2d) 532, 534, 54 P. (2d) 492, 494, the court held void for uncertainty a contract for the sale of a store, because the parties failed to agree as to the time of payment and because of the uncertainty as to what was meant by stating that the note should be "well secured".

In *Hart* v. *Georgia R. Co.,* 52 S. C. 36, 28 S.E. 637, a contract provided that if the plaintiff would erect on a certain lot a permanent, first-class hotel for the accommodation of the travelling public, maintain the same in a first-class manner and accommodate employees of the company at one-half the rate charged for customers, the company by the patronage of its road would maintain and support the hotel. The court in declaring the contract void for uncertainty asked the questions: "What is a first-class hotel? How is a hotel maintained in a first-class manner? What is the patronage of a road running trains day and night at a given point?" and concluded that it was impossible to determine with certainty what the contract between the parties was and therefore it was impossible to determine what would be the damages arising from a failure to carry out the alleged contract.

So in the instant case, what is meant by the words "turned over to the local authorities?" What are the terms under which the control is granted? Are not "terms which in the discretion of the Secretary of War may be equitable and just to the United States and to the local authorities" too indefinite for any court to specifically enforce? Is not

a control, revocable at will and subject to such conditions as the grantor in its discretion sees fit to impose, equivalent to no control at all?

Assuming that the term "turned over" means that the bridges henceforth should be under the authority and control of Alameda County, we immediately see that such control is not absolute, for it is specifically provided that the local authorities may only maintain and operate said bridges "upon such terms as in the discretion of the Secretary of War may be equitable and just to the United States and to the local authorities" (Tr. 170). The second condition of the revocable license provided, "the said three bridges shall be under the supervision of the Engineer Officer of the United States Army" (Tr. 171). How much, if any, control over and above the rules and regulations of the Federal Government was ever vested in the local authorities and how much, if any, of such control was beyond the right of the Federal Government to withdraw at will, is impossible of ascertainment. It is entirely conceivable that the rules and regulations of the Secretary of War and of the Engineer Officer would be sufficient to take from the local authorities every vestige of control over the bridges and to leave said authorities without legal redress. It is submitted that the control feature is void because of the ambiguity of the terms and because of the impossibility of determining from the words of the documents what, if any, degree of control was intended to be placed in the local authorities.

Further ambiguity appears in the resolution of 1909 wherein it is provided "that the United States should, *under such terms and conditions as it might see fit,* lease the waterfront of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks" (Tr. 168) (emphasis added). What could be more indefinite or illusory than a provision that the promisor shall

do a certain thing "under such terms and conditions as he sees fit"? Could any provision be more capricious or more open to the whim or fancy of the promisor than a promise to do a certain thing under such terms and conditions as the promisor sees fit?

What actually happened shows how illusory this promise in fact was. Neither the 1909 nor the 1913 resolution of the board of supervisors made any reference to the harbor lines or the leases being revocable. The provision set forth on the Title Sheet to the harbor lines (Tr. 379) provided the permission to occupy the land between the pierhead and bulkhead lines was revocable at any time when the area might be again required for purposes of navigation. The right to lease the land was actually revoked about 1929 (Tr. 446). If the establishment of harbor lines and opening the land to lease was the consideration for which the County of Alameda undertook to operate the bridges for all time to come, then the Government "saw fit" to revoke the privilege after a period of some seventeen years.

It is submitted that the terms of the purported agreement are so vague and uncertain as to render the contract void and to compel the court to refuse specific performance.

IX.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH X OF "CONCLUSIONS OF LAW" THAT "THE COURTS OF THE STATE OF CALIFORNIA HAD NO JURISDICTION TO DETERMINE SUBSTANTIAL RIGHTS OF THE UNITED STATE IN COUNTY OF ALAMEDA V. ROSS, 32 CAL. APP. (2d) 135, 89 P. (2d) 460" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN THE MATTER OF COUNTY OF ALAMEDA V. ROSS, SUPRA, INTERPRETING THE STATUTES, CONSTITUTIONAL PROVISIONS AND CASE LAW OF SAID STATE IN REGARD TO THE POWERS OF THE BOARD OF SUPERVISORS AND COUNTIES OF SAID STATE, WAS BINDING UPON THE UNITED STATES DISTRICT COURT IN THE PRESENT ACTION AND THAT SAID COURT WAS WITHOUT AUTHORITY TO INTERPRET SAID STATUTES, CONSTITUTIONAL PROVISIONS AND SUBSTANTIVE LAW CONTRARY THERETO (APPENDIX p. xxxiv).

The appellant has never contended, and does not now contend that the judgment of the California District Court of Appeal in the matter of *County of Alameda* v. *Ross, supra,* determined the substantial rights of the United States to have the Fruitvale Avenue Bridge operated and maintained by Alameda County. The Government was not a party to the action in the state court. However, the United States was notified by the District Attorney of Alameda County as counsel for the County of Alameda of the filing of said petition for writ of mandate in said action. Copies of all papers filed in said action by both petitioner and respondent including stipulation of facts and all briefs were sent to, and received by the United States Attorney in San Francisco during the proceedings and before the case was submitted (Tr. 142). The Government therefore had sufficient notice to intervene in said action had it seen fit to do so and to object to any of the proceedings taken therein.

In the case of *County of Alameda* v. *Ross, supra,* the board of supervisors of Alameda County sought a writ of mandate against Ross, auditor of said county, to compel him to draw his warrant in payment of the claim for materials used in repairing the railroad portion of the Fruitvale Avenue Bridge. In order to decide whether the writ should issue it was necessary for the District Court of Appeal to determine the validity of the alleged agreement between the County of Alameda and the United States Government. The state court had before it the 1910 license of the Secretary of War and the 1913 resolution of the board of supervisors of Alameda County which incorporated and set forth in full the operative portion of the 1909 resolution of said board, the identical documents which were presented to the United States District Court for interpretation in the present action.

The County of Alameda urged the same objections against the validity of the alleged agreement in the state court as it later urged in the United States District Court. The state court passed on many of the same questions of law here presented, and concluded that the alleged agreement was void for lack of consideration and mutuality, also becauce it violated section 31 of article IV of the constitution of the State of California prohibiting a gift of public funds to a private corporation and because the alleged contract was absolutely void under the provisions of section 4005 of the Political Code of the State of California due to the fact that the board of supervisors of Alameda County was without authority to enter into the same. The United States District Court should have concluded as a matter of law that it was bound by the interpretation of the constitutional provisions and statutes of the state as well as the substantive law relating to contracts as set forth in the *Ross* case.

The District Court of Appeal in the *Ross* case relied

upon the decisions of the Supreme Court of the State of California when it declared the alleged contract a violation of section 31 of article IV of the state constitution. (*County of Los Angeles* v. *Jessup,* 11 Cal. (2d) 273, 78 P. (2d) 1131; *Howell* v. *Phelan,* 138 Cal. 271, 71 Pac. 335; *Higgins* v. *San Diego Water Co.,* 118 Cal. 524, 45 Pac. 824, 50 Pac. 670.)

In declaring the alleged contract void by reason of section 4005 of the Political Code, the court quoted with approval the language of *County of Modoc* v. *Spencer,* 103 Cal. 498, 37 Pac. 483. Likewise in declaring the alleged contract void for lack of mutuality the District Court relied upon the Supreme Court decision in *Naify* v. *Pacific Indemnity Co.,* 11 Cal. (2d) 5, 76 P. (2d) 663. Therefore, the law laid down in the case of *County of Alameda* v. *Ross* is the law of the State of California as enunciated by the highest court of that state and as applied by a court of that state, namely, the District Court of Appeal, to the identical documents now before this court for consideration. It would indeed be hard to conceive of a situation where state courts had more directly and explicitly interpreted state law in regard to a matter presented to the federal court for decision.

A state court's interpretation of its own statutes, particularly those statutes defining or limiting powers of the political subdivisions of the state, has always been held binding upon the federal courts.

In *Claiborne County* v. *Brooks,* 111 U. S. 400, 410, 28 L. ed. 470, 474, the Supreme Court of the United States said:

> "It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as

authoritative by the courts of the United States; . . ."

In *City of Richmond* v. *Smith,* 15 Wall. 429, 438, 21 L. ed. 200, 202, the Supreme Court said:

". . . State courts certainly have a right to expound the statutes of the State, and having done so, those statutes, with the interpretation given to them by the highest court of the State, become the rules of decision in the Federal courts." [1]

The rule stated in the foregoing cases has been amplified and extended to include the substantive and case law of a state in the case of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 78, 82 L. ed. 1188, 1194, 58 Sup. Ct. 817, 822, wherein Justice Brandeis in delivering the opinion of the Court stated:

". . . Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. . . .

". . .

"Thus the doctrine of *Swift* v. *Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' . . ."

In the recent case of *West* v. *American Telephone* &

1. Accord: *Old Colony Trust Co.* v. *Omaha,* 230 U.S. 100, 116, 57 L. ed. 1410, 1416, 33 Sup. Ct. 967, 971; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U.S. 157, 166, 61 L. ed. 644, 649, 37 Sup. Ct. 318, 321; *Memphis Street Railway Co.* v. *Moore,* 243 U.S. 299, 301, 61 L. ed. 733, 735, 37 Sup. Ct. 273, 274; and *Georgia Railway Co.* v. *Decatur,* 262 U.S. 432, 438, 67 L. ed. 1065, 1073, 43 Sup. Ct. 613, 615.

Telegraph Company, 85 L. ed. 146, 150, 61 Sup. Ct. 179, 183, the Supreme Court stated:

> "A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much it may have departed from prior decisions of the federal courts. See *Erie R. Co.* v. *Tompkins, supra* (304 U.S. 78, 82 L. ed. 1194, 58 S. Ct. 817, 114 A.L.R. 1487); *Russell* v. *Todd, supra* (309 U.S. 293, 84 L. ed. 762, 60 S. Ct. 527)." [2]

Whether this Court considers the decision in the case of *County of Alameda* v. *Ross, supra,* as a mere restatement of the statutory and substantive law of the State of California, as laid down by the Supreme Court of that state, or whether it looks upon that decision as the decision of an intermediate court and concedes that there is an "absence of convincing evidence that the highest court of the state would decide differently", it is submitted that the United States District Court was bound by the interpretation of the law set forth in that case. This is particularly true in view of the fact that the petition for writ of man-

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2. The same rule was reiterated in the following cases: *Six Companies of California* v. *Joint Highway District,* 85 L. ed. 159, 162, 61 Sup. Ct. 186, 188; *Fidelity Union Trust Company* v. *Field,* 85 L. ed. 176, 178, 61 Sup. Ct. 176, 178; and *Stoner* v. *New York Life Insurance Co.,* 85 L. ed. 275, 277, 61 Sup. Ct. 336, 338.

date in the *Ross* case was filed originally in the Supreme Court of the State of California and was transferred by said Court to the District Court of Appeal and that subsequent to the decision of the District Court a petition to have the cause heard in the Supreme Court of California was denied on the 1st day of June, 1939 (Tr. 142).

X.

THE COURT ERRED IN NOT CONCLUDING AS A MATTER OF LAW THAT EQUITY WILL NOT DECREE SPECIFIC PERFORMANCE OF AN ALLEGED CONTRACT WHICH IS OPPRESSIVE, UNJUST AND UNCONSCIONABLE (APPENDIX p. xxxvi).

Assuming, for the sake of argument only, that the alleged agreement is legally sufficient, still a court of equity will not lend its aid to specifically enforcing a contract which is oppressive, unjust and unconscionable. A decree that the taxpayers of Alameda County should be forever burdened with the obligation of operating, maintaining, repairing and if necessary rebuilding the Fruitvale Avenue Bridge, the property of the United States, for the benefit of the Government and of a private railroad company in return for the revocable privilege of controlling said bridge would be contrary to the most fundamental laws of equity and good conscience.

As we have heretofore pointed out, if the appellant's theory is correct that the control of the bridges was the object and prime consideration for the working arrangement entered into by the County of Alameda with the federal government, the so-called agreement is utterly lacking in mutuality, hence void and unenforceable either in law or equity. If we accept the Government's theory that the electrification of the bridges at a cost of approximately $21,000 was the consideration for the execution of the agreement, then the consideration is so inadequate and the contract so grossly inequitable and unjust to the County of Alameda that no court of equity should lend

its aid to order the specific performance thereof. The County of Alameda has repaid the cost of such electrification more than thirty-four times during the past twenty-seven years.

The rule that equity will be bound by principles of fairness and good conscience is so well established as to need no citation of authority. The Supreme Court of the United States from the earliest times has recognized that courts of equity are courts of conscience and that the power to order specific performance is exercised under the sound discretion of the court with an eye to the substantial justice of the case.

In the very early case of *King* v. *Hamilton,* 29 U. S. 311, 327, 7 L. ed. 869, 875, the Supreme Court of the United States said:

> ". . . When a party comes into a court of chancery, seeking equity, he is bound to do justice, and not ask the court to become the instrument of iniquity. Where a contract is hard, and destitute of all equity, the court will leave parties to their remedy at law; and if that has been lost by negligence, they must abide by it. It is a well settled rule, therefore, to allow a defendant in a bill for a specific performance of a contract to show that it is unreasonable or unconscientious, or founded in mistake, or other circumstances, leading satisfactorily to the conclusion, that granting the prayer of the bill would be inequitable and unjust. . ."

In *Pope Manufacturing Co.* v. *Cormully,* 144 U. S. 224, 236, 36 L. ed. 414, 419, 12 Sup. Ct. 632, 637, the Supreme Court of the United States said:

> "But whether this contract be absolutely void as contravening public policy or not, we are clearly of the opinion that it does not belong to that class of contracts, the specific performance of which a court of equity can

be called upon to enforce. To stay the arm of a court of equity from enforcing a contract it is by no means necessary to prove that it is invalid; from time to time immemorial it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts; and to turn the party claiming the benefit of such contract over to a court of law. This distinction was recognized by this court in *Cathcart* v. *Robinson,* 5 Pet. 264, 276, wherein Chief Justice Marshall says: 'The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. 10 Ves. 292; 2 Coxe's Cases in Chancery, 77. It is said that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific performance, by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscientious or unreasonable. . . are enumerated among the causes which will induce the court to refuse its aid.' . . ."

In the instant case there is no claim made that the United States Government secured the alleged promise of the County of Alameda to operate, maintain, repair and, if necessary, rebuild the Fruitvale Avenue Bridge by sharp or unscrupulous practices or by overreaching or by concealment of important facts. However ,it is claimed that the contract itself is "unfair, one-sided, unconscionable" and affected by such inequitable features that specific performance would be oppressive upon, and would work a definite injustice to the County of Alameda.[1]

The case and statutory law of the State of California is

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1. *Willard* v. *Tayloe,* 8 Wall. 557, 567, 19 L. ed. 501, 504; *Woollums* v. *Horsley,* 93 Ky. 582, 585, 20 S.W. 781; and *Pugh* v. *Phelps,* 37 N.M. 126, 131, 19 P. (2d) 315, 318.

in harmony with the rules expressed in the above quotation. Section 3386 of the Civil Code of the State of California provides:

> "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance."

Section 3391 of the same code reads as follows:

> "Specific performance cannot be enforced against a party to a contract in any of the following cases:
>
> "1. If he has not received an adequate consideration for the contract;
>
> "2. If it is not, as to him, just and reasonable; . . ."

In the instant case reason and common sense would demand that the 1909 and 1913 resolutions of the board of supervisors and the 1910 revocable license of the United States Government be so construed as to negative any intent on the part of the county to have forever bound itself to operate and maintain the Fruitvale Avenue Bridge.

An additional reason why this court should not order specific performance of the alleged agreement is that said agreement was utterly lacking in consideration, for the reason that in electrifying the bridges the United States Government was only doing what it was legally bound to do under the terms of the *Crooks* decree. Insofar as pertinent, said decree reads as follows (Tr. 131):

> "Defendants, the County of Alameda, . . . not having claimed damages, no damages are awarded to them.
>
> "It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair *suitable* bridges across the same on all the roads now used as public highways crossing the line of said canal and also

suitable railroad bridges on the present railroad tracks crossing the line of said canal." (Emphasis added.)

The meaning of the word "suitable" is all important in determining the liability of the federal government under the above quoted judgment. Webster defines "suitable" as follows:

"That is suited to one, one's needs, wishes, or condition, the proprieties, etc., appropriate; fitting;"

In 60 Corpus Juris, page 1003, it is said:

"SUITABLE. The word is an elastic, and varying term, dependent upon the necessities of changing times or conditions. It has been defined as meaning adapted; appropriate; capable of suiting; compatible with safety; convenient; fit and appropriate for the end to which it is to be devoted; fitting; likely to suit; reasonable; safe or not defective. The word has been construed as being substantially equivalent to 'fit', 'good', and 'sufficient'; and distinguished from 'adequate,' and 'used.' "[2]

The question therefore arises: what type of bridge was suitable, adequate and sufficient to take care of the needs of highway, railroad and channel traffic in 1913 and in the years thereafter?

Prior to 1913 the bridges operated over the Oakland Estuary were equipped for manual operation taking approximately thirty minutes to open and the same time to close (Tr. 132). The Tidal Canal was intended to be, and actually was a navigable body of water. According to the Agreed Statement of Facts boats, barges and scows plied up and down said Canal (Tr. 132). The population of Oakland had increased almost five times in the years intervening between the date of the construction of the Fruitvale Avenue Bridge and the 17th day of November, 1913. It must be conceded that a bridge suitable to handle the

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2. For further definitions of the word "suitable" see: *United States* v. *American and Patterson*, 9 Ct. Cust. App. 244, 245; *Sawyer* v. *Gilmore*, 109 Me. 169, 184, 83 Atl. 673, 680; and *Mumme* v. *Marrs*, 120 Tex. 383, 396, 40 S.W. (2d) 31, 36.

traffic of two sparsely settled communities in 1901 had necessarily become inadequate and nonsuitable in 1913, when the two communities had greatly increased in population and grown industrially and when the channel, highway, pedestrian and railroad traffic had likewise greatly increased in volume.

One of the conditions under which the license to control the bridges was granted to Alameda County was:

> "3.——That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions." (Tr. 171-172).

However, it may be seen that by the doing of the things set forth in the foregoing paragraph, the federal government was only maintaining bridges "suitable" for public highways and railroad bridges, as it was previously bound to do by the judgment in the *Crooks* case.

The Court may take judicial notice of the fact that most drawbridges spanning bodies of water over which a continuous stream of highway and railroad traffic passes, have been electrified and modernized within the last thirty years. The duty on the part of the federal government to construct and keep in repair "suitable" bridges across the canal would necessarily have involved the electrification and modernization of the bridges. Therefore the federal government by its promise to the county to electrify and modernize the bridges, suffered no detriment in addition to that which it was previously bound to suffer, nor did the County of Alameda receive any benefit to which it was not already entitled.

To promise to do that which one is already bound to do is not a valid consideration for a new promise. This rule

of law is set forth in 13 Corpus Juris, section 207, page 351, as follows:

> "A promise to do what the promisor is already bound to do cannot be a consideration, for if a person gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal. . . ."

Section 209, page 353, continues as follows:

> "The promise of a person to carry out a subsisting contract with the promisee or the performance of such contractual duty is clearly no consideration, as he is doing no more than he was already obliged to do, and hence has sustained no detriment, nor has the other party to the contract obtained any benefit. Thus a promise to pay additional compensation for the performance by the promisee of a contract which the promisee is already under obligation to the promisor to perform is without consideration. . ."

Innumerable cases from the federal courts as well as from courts of California [3] and other state jurisdictions might be cited in support of this universally recognized rule of law. However, the following quotation from the case of *In re Riff* (D.C.E.D. Ark. 1913) 205 Fed. 406, 409, sufficiently states the rule in the following language:

> "It is also a well-recognized principle of law that when a party merely does that which by law he is obligated to do he cannot demand any additional consideration therefor, even if he obtained a promise, as the law will regard it as *nudum pactum* and will not lend its process to aid in the wrong."

It is submitted that the United States Government by electrifying and modernizing the Fruitvale Avenue Bridge was merely constructing and maintaining "suitable" bridges as it was legally bound to do by the judgment in the *Crooks*

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3. That the foregoing rule is well recognized by the courts of California is stated in the case of *Pacific Finance Corporation* v. *First National Bank*, 4 Cal. (2d) 47, 50, 47 P. (2d) 460, 462.

case; that its subsequent promise to the county to do so was not a sufficient consideration for the promise of the county to repair, maintain and rebuild said bridge and that a court of equity should have refused the prayer of the appellee for specific performance of the alleged contract which is not only lacking in mutuality and consideration but is also oppressive, unjust and unconscionable.

XI.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH XII OF "CONCLUSIONS OF LAW" WHICH READS "THAT THE COUNTER CLAIM OF THE DEFENDANT COUNTY OF ALAMEDA BE DISMISSED AND SAID DEFENDANT COUNTY TAKE NOTHING THEREBY" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE COUNTERCLAIM OF THE DEFENDANT COUNTY OF ALAMEDA BE ALLOWED AND THAT THE SAID COUNTY HAVE ITS COSTS EXPENDED IN THIS PROCEEDING (APPENDIX p. xxxv).

The prinicples of law hereinbefore discussed establish the fallacy of the conclusion of law that the counterclaim of the County of Alameda should be denied and that the said county take nothing in this action. For the reasons set forth in the foregoing sections of this brief the United States District Court should have found that the alleged contract between the United States and the County of Alameda was *ultra vires* and void and should have decreed that the County of Alameda was relieved of all liability in respect to the operation, maintenance, repairing and rebuilding of the Fruitvale Avenue Bridge and that said county should have its costs in this action.

XII.

ERROR IN FINDINGS OF FACT CONCERNING THE NAVIGABILITY OF THE TIDAL CANAL AND ERROR IN THE REJECTION OF THE TESTIMONY OF MAJOR G. H. MENDELL AND OF THE FACT THAT SAID MENDELL WAS DECEASED (APPENDIX pp. xxxvi, xxxvii).

The appellant shall discuss the four following assignments of error together:

First: That the fact set forth in paragraph V of the Findings of Fact which read: "The Tidal Canal was not open to navigation" (Tr. 252) is erroneous and the court should have found in lieu thereof that the Tidal Canal was navigable in fact (Appendix p. xxv).

Second: That the fact set forth in paragraph XI of the Findings of Fact which read: "On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made available to adjacent property owners a twenty-five foot strip of property along each side of the Canal for the construction of wharves and warehouses" (Tr. 263) is erroneous and the court should have found in lieu thereof that prior to June 3, 1913 the Tidal Canal was open to navigation (Appendix p. xxvi).

Third: That the court erred in refusing to admit in evidence the testimony of the witness, Major G. H. Mendell, given in the case of *United States* v. *Crooks* (Appendix p. xxxvi).

Fourth: That the court erred in refusing to admit evidence of the fact that the said Major Mendell was deceased prior to the commencement of the proceeding now before this court and during his lifetime was the same party named as defendant in *United States* v. *Crooks* (Appendix p. xxxvii).

The Government stipulated (Tr. 131-132, 166, 391) and the district court found (Tr. 250-252) that after the condemnation proceeding in the *Crooks* case the United States constructed the Tidal Canal which for many years prior

to 1913 averaged eight to ten feet in depth and had a clearance of twelve feet eight inches below the Fruitvale Avenue Bridge and of thirteen feet three inches below the Park Street and High Street Bridges and that "boats, barges and scows . . . plied up and down said Tidal Canal." The bridges were originally equipped to be opened and closed with hand operated machinery and were so opened and closed on occasions, not only by the United States but also by private interests, to permit passage of vessels which could not clear the bridges.

The Agreed Statement of Facts contains no statement to the effect that the Tidal Canal was not open to navigation prior to June 1913, or that the United States opened it to navigation on that date, nor is either fact a logical inference from anything contained therein. In the testimony of Captain Pond there was no mention of the navigability of the Tidal Canal nor of the opening of the canal to navigation (Tr. 373-460). Any allegation concerning these matters contained in the Government's complaint was negatived by the stipulation of the parties that the Agreed Statement of Facts completely superseded the pleadings (Tr. 126). Therefore there is a total absence of any evidence to support either of these findings of fact.

It is submitted that the foregoing stipulated and determined facts made the Tidal Canal navigable and open to navigation both in law and in fact for many years prior to 1913.

Additional evidence to support this conclusion is the endorsement of June 3, 1913 on exhibit 9 of the United States (Tr. 379) concerning occupancy of the government strip of land along the Tidal Canal which read in part as follows:

> " . . . this permission is revocable at any time when the area may be *again* required for purposes of navigation . . ." (Tr. 495) (Emphasis added).

The use of the word "again" clearly indicates that said canal had been used for purposes of navigation prior to this endorsement of June 3, 1913.

Even assuming that the Government did open the canal to navigation in June 1913, there was evidence adduced that it did so gratuitously as part of a plan to develop San Francisco Bay area (Tr. 414, 417-418, 441) and without any agreement that it was so doing in consideration for any promise of any kind by the County of Alameda to operate or maintain the bridges. Furthermore the Government was bound by the judgment in the *Crooks* case to operate the Tidal Canal as a navigable waterway, as appellant would have shown by the testimony of G. H. Mendell, Major of Engineers, in that case, had it been permitted to do so.

Over the objection of appellant that the report regarding proposed plan for improving Oakland Harbor, 1874 (Tr. 350), was irrelevant and immaterial and should not be admitted unless the testimony of Mendell in the *Crooks* case was likewise admitted (Tr. 335, 337-339), the district court admitted in evidence said report prepared by the said G. H. Mendell, which was offered by the Government for the purpose of showing the purposes for which the Tidal Canal was constructed (Tr. 335, 345).

The district court erred in rejecting the testimony of G. H. Mendell in the *Crooks* case of which his report of 1874 was a part (Tr. 180-196, 202-203) and which did not vary nor contradict said report but which clarified and explained certain things as to which the report was either silent or ambiguous and which was admissible for the following reasons:

1. If the report of 1874 was admissible to show the purposes for which the canal was constructed, then in order to amplify and explain that report and to furnish the court with a more comprehensive picture of the extent and

purpose of said canal, the testimony of the maker of that report given in connection therewith in the condemnation action by which the Government acquired the Canal, should likewise have been admitted. There is no doubt that if Mendell had been alive he could have been called as a witness and could have explained and clarified the material contained in his report. The fact that Mendell was dead (Tr. 198) did not affect the materiality of his testimony and no objection was made to its competency.

2. The testimony was admissible to explain the ambiguity of the decree in the *Crooks* case which was admitted in evidence and which concluded as follows (Tr. 161-165):

> "It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair *suitable* bridges across the same on all roads now used as public highways, crossing the line of said canal and also *suitable* railroad bridges on the present railroad tracks crossing the line of said canal." (Tr. 165). (Emphasis added.)

For the purpose of establishing the fact that the Tidal Canal was intended to be a navigable waterway and defining the meaning of "suitable" bridges, the testimony of Major Mendell should have been admitted. Had this been done, the district court would not have found that the Tidal Canal was not navigable or was not open to navigation prior to June 1913, for Major Mendell testified as follows:

> "Q. Do you propose it (Tidal Canal) for navigable purposes?
>
> "A. Yes sir. . . (Tr. 193).
>
> "Q. Do you think that the land through which this canal is to be constructed would be benefited by the canal?
>
> "A. I don't see why it wouldn't be; that is the adjoining parts of it. . . (Tr. 193, 194).
>
> "Q. You expect Colonel Mendell to make this a navigable canal. Do you intend to make the bridges across the canal draw bridges?

"A. I suppose so. It would not be navigable without it sir." (Tr. 195).

If at the time the decree was rendered it was contemplated that the canal would be constructed for navigation, then the Government was bound to construct and maintain a navigable waterway under said decree and was also obligated thereunder to equip the Fruitvale Avenue Bridge for electrical operation in 1913, when due to increased traffic and modern improvements a hand-operated bridge was no longer a "suitable" bridge because of the length of time required to open and close the same (Tr. 132).

Hence the keeping of the Tidal Canal open for navigation and equipping the Fruitvale Avenue Bridge for electrical operation in 1913 furnished no consideration whatever for the County of Alameda to execute the alleged license agreement since the United States was only doing that which it was legally bound to do under the provisions of said decree in the *Crooks* case.

3. The testimony was also admissible to explain and amplify that portion of the decree in the *Crooks* case which reads as follows:

"Defendants the County of Alameda, . . . not having claimed damages, no damages are awarded to them." (Tr. 164-165).

The appellant was entitled to show that the reason that the County of Alameda claimed no damages by reason of said condemnation action was because the county expected to derive a benefit from the fact that the Tidal Canal was open to navigation. The property having been condemned for that purpose and the county having for that reason waived monetary damages, the Government was obligated to continue to keep the canal open to navigation.

The testimony of Major Mendell in the *Crooks* case was material to these issues. This is a court of equity and is bound by equitable principles. It is a fundamental equit-

able principle that equity regards that as done which ought to have been done. [1] "To do or by doing what the law or previous agreement requires, merits nothing and it is not a consideration for anything." [2]

XIII.

FURTHER ASSIGNMENTS OF ERROR IN FINDINGS OF FACT.

The court erred in refusing to find the following facts urged by the appellant County of Alameda in its proposed Amendments and Additions to Findings of Fact and Conclusions of Law (Tr. 230-240) for the following reasons:

1. The court should have found that the harbor lines were revocable at will by the Secretary of War and were in fact revoked by him in 1929 (Tr. 238). Captain Pond testified that the pierhead lines were moved back to the bulkhead lines some time around 1929 (Tr. 446).

2. The court should have found that the permission given to adjacent property owners to occupy the strip of land along the canal for the construction of wharves and warehouses was without special lease of any kind and was expressly revocable by the Government (Tr. 238). The endorsement on the Title Sheet of Maps of San Francisco Bay of 1912 definitely stated that the permission to occupy the strip of property between the pierhead and bulkhead lines was revocable at any time when this area might again be required for purposes of navigation (Tr. 379).

3. The court should have found that in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 P. (2d) 460, the District Court of Appeal of California had before it the resolution of the board of supervisors of the County of Alameda of November 10, 1913 which incorporated the

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1. California Civil Code § 3529.
2. Bishop, *Contracts,* § 48; and *Pacific Finance Corp.* v. *First National Bank of Puente,* 4 Cal. (2d) 47, 50, 47 P. (2d) 460, 462.

resolution of said board of December 6, 1909 (Tr. 239). The opening paragraph of the resolution of the board of supervisors of November 10, 1913 (Appendix p. xliv) embodied the entire operative section of the resolution of the board of supervisors of December 6, 1909 (Appendix p. xl).

4. The court should have found that the United States was notified by the District Attorney of the County of Alameda as counsel for the County of Alameda of the filing of the "Petition for Writ of Mandate" in *County of Alameda* v. *Ross, supra,* and that copies of all papers filed in said action by both petitioner and respondent, including the stipulation of facts and all briefs, were sent to and received by the United States Attorney in San Francisco during the proceeding and before the case was submitted (Tr. 239-240). In the Agreed Statement of Facts the parties stipulated to the foregoing facts (Tr. 142) which are important because this is an equitable proceeding and it is incumbent upon the appellant to show that it is now, and always has been acting in good faith towards the United States Government.

CONCLUSION

For the foregoing reasons it is submitted that the Southern Division of the United States District Court for the Northern District of California erred in concluding as a matter of law that the County of Alameda and the United States of America entered into a valid, binding contract and that under said contract the County of Alameda was obligated to operate, maintain, repair and rebuild the Fruitvale Avenue Bridge and in directing that judgment be entered in accordance with its Findings of Fact and Conclusions of Law.

Accordingly, Appellant County of Alameda prays for a reversal of this erroneous and inequitable decree and that its counterclaim and costs be allowed.

Dated: May 1, 1941.

Respectfully submitted,

RALPH E. HOYT,
District Attorney in and for the County of Alameda, State of California,

J. F. COAKLEY,
Chief Assistant District Attorney in and for the County of Alameda, State of California,

ROBERT H. MCCREARY,
Assistant District Attorney in and for the County of Alameda, State of California,

CECIL MOSBACHER,
Deputy District Attorney in and for the County of Alameda, State of California,

Attorneys for Appellant County of Alameda.

APPENDIX

APPENDIX

I.

IN THE SOUTHERN DIVISION
OF THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff*, vs. COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Political Subdivision of the State of California), CENTRAL PACIFIC RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY, *Defendants*.	No. 21467-L.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause heretofore came on duly and regularly for trial and hearing before this Court, sitting without a jury; Messrs. Frank J. Hennessy, United States Attorney, William E. Licking, Assistant United States Attorney, and Brice Toole, Attorney, Department of Justice, appearing for the plaintiff, and Messrs. Ralph E. Hoyt, District Attorney, J. F. Coakley, Chief Assistant District Attorney, Robert H. McCreary, Assistant District Atorney, and Cecil Mosbacher, Deputy District Attorney, appearing for the defendant County of Alameda, and Mr. E. J. Foulds, appearing for the defendants Central Pacific Railway Company, and Southern Pacific Company; both oral and documentary evidence having been introduced at

the trial thereof, on behalf of the respective parties hereto, and the evidence being closed, and the cause submitted to this Court for its decision and determination, and the Court being duly advised in the premises, finds the following facts:

FINDINGS OF FACTS

I.

The plaintiff is the United States. The County of Alameda was at all times herein mentioned, and now is a body corporate and politic, and a political subdivision of the State of California. The Central Pacific Railway Company, and the Southern Pacific Company are private corporations, duly authorized and licensed to do business within the State of California, and are engaged in the business of operating railroad lines within and without said State, and are the owners of, or claim some interest in, certain railway rights of way within the said County of Alameda in or over the Tidal Canal described hereafter, and more particularly in, over and upon the Fruitvale Avenue Bridge hereinafter mentioned.

II.

The City of Alameda and the City of Oakland are both situated upon the east shore of San Francisco Bay, a navigable body of water. Both said cities are located within Alameda County, State of California, and are separated from each other by a navigable body of water known at various times and in various quarters by the following names: San Antonio Estuary, Oakland Estuary, Oakland Harbor, Inner Harbor and Tidal Canal and Alameda Estuary. Said body of water is roughly seven miles in length, extending in a general east and west direction from San Leandro Bay, an arm of San Francisco Bay, on the east, to another point in San Francisco Bay proper at the end of the

moles of the Southern Pacific Railroad Company and the Western Pacific Railroad Company on the west. Said Estuary constitutes what is commonly known as Oakland's inner harbor; the outer harbor extending in a northeasterly direction for about two miles from the entrance to the inner harbor. The westerly end of the Estuary, for a distance of about two miles, is an entrance channel, protected by stone retaining walls on either side. Said entrance channel varies from Seven Hundred and Fifty to Eight Hundred and Fifty feet in width. Immediately east of said entrance channel lies the main portion of the inner harbor, with docking facilities; the width of the channel here being Six Hundred feet, and the natural harbor varying from Six Hundred and Fifty feet at the narrowest points to about Three Thousand Five Hundred feet at the easterly end where the harbor widens to form what is known as Brooklyn Basin.

Easterly of Brooklyn Basin and forming a continuous part of the same body of water is the "Tidal Canal" nearly two miles in length connecting the inner harbor with San Leandro Bay. Said Tidal Canal was originally dredged by the United States to turn the water from San Leandro Bay or estuary through a tidal canal into the head of San Antonio estuary, so as to increase the tidal flow into and through said San Antonio estuary, for the purpose of removing the sediment from the same, AND AFFORDING A DEEPER ENTRANCE TO SAID SAN LEANDRO BAY THROUGH SAN ANTONIO ESTUARY AND THE CANAL, ALL IN THE INTEREST OF COMMERCE AND NAVIGATION ON THE EAST SIDE OF SAN FRANCISCO BAY.

III.

In the year 1874 Congress enacted the Rivers and Harbors Act for that year, in which the sum of $100,000 was

appropriated "for the improvement of Oakland Harbor;" (18 Stat. 237, c. 457) to be expended under the direction of the Secretary of War.

In 1876 the United States instituted a condemnation proceeding in the District Court of the Third Judicial District in and for the State of California (now the Superior Court of the State of California, in and for the County of Alameda) to acquire a right of way for the said Tidal Canal, said action being entitled The United States, plaintiff, v. Crooks, County of Alameda, Central Pacific Railroad Company, et al, defendants, action No. 3590 in the records of the County Clerk of the County of Alameda for the District Court of the Third Judicial District, the State of California, in and for the County of Alameda.

IV.

In said suit the County of Alameda and the Central Pacific Railroad Company were named, among others, as defendants and the United States sought to condemn the rights of the County and of the railroad in certain higways and railroad rights of way which crossed the proposed Tidal Canal at the places where the Fruitvale Avenue, High and Park Street bridges are now located, and at Washington Avenue, where a railroad right of way was then located. The right of way and tracks of the Central Pacific Railroad Company, which crossed the proposed Tidal Canal at Fruitvale Avenue, paralleled and adjoined the right of way of the county road belonging to the defendant, County of Alameda, which also crossed the proposed Tidal Canal at Fruitvale Avenue.

The County of Alameda and the railroad company asked for no damages in said condemnation proceedings, and in the decree in said action hereinabove referred to, it was provided, among other things

"Defendants, the County of Alameda, The Central

Pacific Railroad Company, Charles Heinecke and S. A. Smith, not having claimed damages, no damages are awarded to them.

"It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the lines of said canal."

V.

After said decree of condemnation, the United States constructed said Tidal Canal TO A DEPTH AVERAGING IN SOUNDINGS FROM 8 TO 10 FEET, SAID SOUNDINGS REFERRING TO THE PLANE OF MEAN LOWER LOW WATER,—as per "Exhibit 2" page 91 of the "Agreed Statement of Facts" on file herein, and constructed, and until November 17, 1913, maintained and operated highway drawbridges at Park Street and High Street, and a combination railroad, vehicular and pedestrian drawbridge at Fruitvale Avenue, THE LATTER WITH A CLEARANCE BELOW SUCH BRIDGE OF 12 FEET 8 INCHES ABOVE MEAN LOWER LOW WATER—as per "Exhibit 2" page 91 of the "Agreed Statement of Facts" on file herein. The Park Street Bridge was completed in 1891; the High Street and Fruitvale Avenue Bridges were completed in 1901 and said construction of said Tidal Canal was completed in 1903.

The bridges were constructed as drawbridges of the swing type, turning or pivoting horizontally upon central piers, and were equipped with hand-operated machinery. It took approximately thirty minutes to open and thirty minutes to close each of these bridges. After these bridges were equipped with electrical operating machinery, as here-

inafter set forth, it took from two to three minutes to open, and the same time to close each of said bridges.

Prior to said installation of electrical operating machinery the United States did not regularly operate said bridges, but did, on occasions, open and close them on request of private interests for the passage of vessels; private interests on occasions also opened and closed said bridges on their own responsibility for the passage of vessels which could not clear said bridges when closed; and boats, barges and scows which could clear said bridges when closed plied up and down said Tidal Canal. The Tidal Canal was not open to navigation.

VI.

Prior to the institution of said condemnation proceedings the Central Pacific Railroad Company (predecessor of defendant Central Pacific Railway Company) was the owner of two lines of railroad extending across the lands sought to be condemned. One line of said roalroad was on or adjoining Fruitvale Avenue, and the other line was on or adjoining Washington Avenue, across the site of the proposed Tidal Canal, in said Alameda County, and the said Central Pacific Railroad Company was the owner of rights of way in said two lines of railroad, and was a party defendant in said condemnation proceedings.

VII.

On March 7, 1901, an agreement in writing was entered into between the United States, Central Pacific Railway Company (said Central Pacific Railway Company having succeeded to the interest of said Central Pacific Railroad Company) and the Southern Pacific Company (lessee of Central Pacific Railway Company), under which agreement the Central Pacific Railway Company in consideration of $50,000 agreed to abandon its line of railroad on or

adjoining Washington Avenue, and to relieve the United States of any obligation to construct or maintain a drawbridge across said Tidal Canal at Wasington Avenue. The defendant railroad companies claim no right or title in the Fruitvale Avenue bridge except those rights conferred upon them, or their predecessors, by the decree in United States v. Crooks et al.

VIII.

On December 6, 1909, the Board of Supervisors of Alameda County adopted a Resolution as follows:

"RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA, ACCEPTING PARK STREET, FRUITVALE AVENUE AND HIGH STREET BRIDGES.

"Whereas, there exists in the County of Alameda, State of California, over and across the United States Tidal Canal, certain draw bridges commonly known as the Park Street Bridge and Fruitvale Avenue Bridge, and the High Street Bridge, all of which bridges were constructed over said canal by, and belong to, and are the property of, the United States of America; and

"Whereas, no provision has ever been made for the operation of said bridges by the United States Government; and

"Whereas, that portion of said canal between said bridges has never been open to navigation; and

"Whereas, the requirements of commerce and shipping would be materially benefited by the operation of said bridges, and the opening of said canal to navigation in such manner as to permit the passage of vessels in said canal; and

"Whereas, Lieutenant Colonel John Biddle, U. S. A., in his report upon the improvement of rivers and harbors in the First San Francisco, California Districts, has recommended that the bridges hereinbefore refer-

red to, to-wit, the High Street Bridge, Fruitvale Avenue Bridge and the Park Street Bridge be turned over to the County of Alameda, provided that the County of Alameda thereafter assume all cost of repair, operation and replacement when necessary; and

"Whereas, the Honorable Joseph R. Knowland, Congressman from the Third District of California, has succeeded in securing the recommendation of the War Department that permission be given to turn these bridges over to the County of Alameda; and,

"Whereas, the City of Alameda, acting by and through its regularly constituted authorities thereunto duly authorized, has agreed to supply electric power for the operation of said bridges hereinabove referred to for the period of five years, without cost to the said County of Alameda, now, therefore,

"Be It Resolved that the County of Alameda, by and through its Board of Supervisors thereunto duly authorized, hereby agrees to accept said bridges, to-wit: The said Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge and to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges, and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the waterfront of the tidal canal and establish harbor lines so as to permit the construction of wharves and docks; and

"Be It Further Resolved that a copy of this resolution be sent by this Board under seal of this Board to United States Senator George C. Perkins, Congressman Joseph R. Knowland, Lieutenant Colonel John Biddle, and to the City Clerk of the City of Alameda.

"Passed and adopted by the following votes:

"Ayes: Supervisors—Bridge, Foss, Mullins and Ch. Honrner 4.

"Noes: Supervisors—None.

"Absent: Supervisors—Kelley.

I hereby certify that the foregoing is a true and correct copy of a Resolution adopted by the Board of Supervisors of Alameda, Cal., Monday, December 6th, 1909.

JOHN P. COOK,
County Clerk and Ex-officio Clerk of the Board of Supervisors of Alameda County, Cal.
By H. M. WILSON,
Deputy Clerk."

IX.

On September 3, 1910, the Secretary of War issued a license to the County of Alameda as follows:

"J. A. G. O.
(27215)

"Whereas, by the Act of Congress approved June 25, 1910 entitled 'An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes' (Public ..... No. 264), and under the clause of appropriation therein for 'Improving harbor at Oakland, California,' it is provided, *inter alia,* as follows:

'Provided further, that the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities;

'Provided further, that of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer';

"Now, Therefore, under the authority and discretion in him vested by the above-quoted provision of said Act of Congress, and in accordance with the recommendation of the Chief of Engineers, United States Army, the Secretary of War hereby grants unto the BOARD OF SUPERVISORS OF ALAMEDA COUNTY, CALIFORNIA, A LICENSE, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

This LICENSE is granted subject to the following conditions and provisions:

1.—That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any one of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2.—That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3.—That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4.—That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5.—That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge

to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic.

"Witness my hand this 3rd day of September, 1910.
(Signed) JOHN C. SCOFIELD
Assistant and Chief Clerk for the Secretary of War, in his absence."

X.

On November 10, 1913, the Board of Supervisors of Alameda County adopted a Resolution as follows:

"RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA.

Introduced by Supervisor .....

At meeting held Nov. 10, 1913.

"Whereas, This Board of Supervisors, by resolution heretofore adopted, agreed to accept certain draw bridges across the United States Tidal Canal in Alameda County, commonly known as the Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge, and assume all costs of future repair, operation and replacement of said bridges, provided that each of said bridges were placed in such condition and repair by the United States Government that said bridges, and each of them, might be operated by electricity, and that the United States should, under such terms and conditions as it might see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks; and

"Whereas, subsequent to the adoption of said resolution, and on the 3rd day of September, 1910, the Secretary of War, in accordance with the provisions of an Act of Congress, approved June 25, 1910, entitled 'An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes' (public No. 264), issued a license to the Board of Supervisors, revocable at will by the Secretary of War, to assume control of the

said three bridges built by the United States in connection with the improvement of Oakland Harbor, California, which said license was granted subject to the following conditions and provisions, to-wit:

1. That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2. That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3. That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5. That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic; and

"Whereas, the United States has put all three bridges in condition for operation of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished bridge-tenders' houses and highway gates;

and, also, overhauled all old machinery and put it in good order for operation, under the new conditions as required by paragraph 3 of said License, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

Be It Resolved that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the said three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor, to-wit, the Park Street Bridge, the Fruitvale Avenue Bridge and the High Street Bridge, subject to the conditions and provisions of the aforesaid License of September 3, 1910, said acceptance being effective from and after Monday, November 17th, 1913.

Adopted by the following vote:

Ayes: Supervisors Bridge, Foll, Kelley, Murphy and Chairman Mullins—5.

Noes: Supervisors None.

Absent: Supervisors None.

I, John P. Cook, County Clerk, and ex-officio Clerk of the Board of Supervisors of Alameda County, State of California, do hereby certify that the foregoing resolution hereunto attached is a true and correct copy of a resolution adopted by said Board of Supervisors of Alameda County, State of California, on Monday, November 10, A. D. 1913.

JOHN P. COOK,
County Clerk and ex-officio Clerk of the Board of Supervisors of Alameda County, State of California.

By H. M. WILSON
Deputy Clerk."

XI.

On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made

available to adjacent property owners, a twenty-five foot strip of property along each side of the Canal for the construction of wharves and warehouses.

XII.

Thereafter the said bridges were operated, repaired and maintained at the expense of said County and have been so repaired, maintained and operated except that the bridges at Park Street and High Street have been reconstructed and are now operated, repaired and maintained under other arrangements between the United States and said County which are of no significance to the present case.

XIII.

The total cost to the United States for the repair and electrification of said Fruitvale Avenue, High Street and Park Street Bridges was $21,358.80.

The annual cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge commencing during the fiscal year 1913-1914 to and including the fiscal year 1938-39 is hereinafter set forth. The annual costs paid by the County of Alameda for maintaining and operating the High Street and Park Street Bridges commencing during the fiscal year 1913-14 to the respective

fiscal year of commencement of reconstruction of the High Street and Park Street Bridges are also set forth as follows:

Fiscal Year	Fruitvale Avenue Bridge	High Street Bridge	Park Street Bridge
1913-14	$ 1,937.84	$ 1,875.47	$ 2,891.21
1914-15	11,842.51	14,146.76	9,684.14
1915-16	3,078.39	2,344.54	4,078.73
1916-17	4,072.45	3,953.74	2,840.85
1917-18	5,075.85	2,826.06	6,224.64
1918-19	6,949.80	6,652.10	10,153.72
1919-20	7,812.75	9,769.53	10,357.54
1920-21	18,465.73	6,103.83	9,167.29
1921-22	6,671.50	6,884.75	13,644.52
1922-23	7,215.71	6,796.90	13,503.47
1923-24	6,331.12	14,406.92	8,048.20
1924-25	7,558.69	9,940.27	7,466.12
1925-26	10,037.87	6,832.69	9,972.74
1926-27	8,322.69	7,485.69	7,856.16
1927-28	7,751.94	9,690.75	13,502.22
1928-29	9,888.50	10,965.56	21,003.10
1929-30	12,797.87	22,319.42	10,116.56
1930-31	29,738.53	13,150.53	12,766.64
1931-32	13,840.17	11,472.59	15,079.37
1932-33	10,130.60	9,668.81	11,888.35
1933-34	11,398.59	14,379.24	
1934-35	15,168.07	11,193.94	
1935-36	11,332.04	11,193.42	
1936-37	12,005.73	11,923.38	
1938-39	12,059.32		
Total	$262,148.19	$240,672.69	$200,245.57

The total cost paid by the County of Alameda for maintaining and operating said Bridges for the periods of time hereinabove set forth was $703,066.45.

Subsequent to the end of the fiscal year 1938-39 the average cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge has been approximately One Thousand Dollars ($1,000.00) per month, and the cost of replacing this Bridge is estimated to be approximately One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00).

The total cost of maintaining, operating or replacing said Bridges since November 17, 1913, has exceeded the income

and revenues provided for the fiscal year 1913-14, or any fiscal year prior thereto, and the expenditure was not assented to by two-thirds of the qualified electors of the County of Alemada voting at an election held for that purpose.

In the fiscal year 1913-14, and in each fiscal year thereafter, the income and revenue provided by the County of Alameda for each such fiscal year was sufficient to pay for the maintenance and operation of said Fruitvale Avenue Bridge for each such one (1) fiscal year.

In the fiscal year 1913-14, and in each fiscal year thereafter, prior to the respective fiscal year of the commencement of the reconstruction of the High Street and Park Street Bridges, the income and revenue provided by the County of Alameda for each such fiscal year was also sufficient to pay for the maintenance and operation of said High Street and Park Street Bridges for each such one (1) fiscal year.

XIV.

The Fruitvale Avenue Bridge is a combination railroad, vehicular and pedestrian swing span drawbridge, built upon a single concrete center pier, and has been operated and repaired since November 17, 1913, at the expense of the County of Alameda.

The tracks and right of way of the Central Pacific Railway Company and its lessee the Southern Pacific Company are and were at all times permanent, integral and inseparable parts of the Fruitvale Avenue Bridge as constructed, and said tracks and right of way are, and since the said construction were used by the Central Pacific Railway Company and its lessee the Southern Pacific Company for the transit of both freight and interurban passenger trains over said Fruitvale Avenue Bridge. Both the Central Pacific Railway Company and the Southern Pacific Company are and were at all times private corporations. The

Central Pacific Railroad Company was at all times a private corporation.

XV.

The City of Oakland is on the mainland side of San Francisco Bay. Said City is, and prior to 1909, was, the terminal of all transcontinental railroads in central and northern California. Subsequent to the construction of the Park Street, High Street and Fruitvale Avenue Bridges, the population of the cities of Oakland and Alameda increased steadily and substantially as hereinafter set forth. Industry, shipping and commerce, both interstate and with foreign countries, as well as intrastate, increased proportionately in said cities. Traffic connected with said intrastate, interstate and foreign commerce likewise increased upon the waters described, including the waters of the Tidal Canal. Traffic upon the three bridges spanning said Tidal Canal also increased.

The Fruitvale Avenue Bridge connects residential and industrial sections of the City of Alameda with similar sections of the City of Oakland via Fruitvale Avenue, which Avenue is also a principal thoroughfare cutting through all the main traffic arteries between the Tidal Canal and the countryside. The Fruitvale Avenue Bridge carries the only rail connection both freight and interurban passenger traffic between the mainland and the City of Alameda, which is entirely surrounded by water.

The population of the County of Alameda according to the official census of the United States from 1890 to 1930, both years inclusive, is as follows:

Year	Population
1890	93,864
1900	130,197
1910	246,131
1920	344,177
1930	474,883

The respective populations of the City of Alameda and the City of Oakland, which two cities are separated by the Tidal Canal, according to the official census of the United States from 1880 to 1930, both years inclusive, is as follows:

City of Alameda

Year	Population
1880	5,708
1890	11,165
1900	16,464
1910	23,383
1920	28,806
1930	35,033

City of Oakland

Year	Population
1880	34,555
1890	48,682
1900	66,960
1910	150,174
1920	216,261
1930	284,063

XVI.

On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 Pac. (2d) 460.

XVII.

Thereafter, on July 27, 1939, the Central Pacific Railway Company and the Southern Pacific Company served notice upon the plaintiff herein requesting that the plaintiff comply with the Decree in the case of *United States* v. *Crooks,* and others, and cause the Fruitvale Avenue Bridge to be inspected, maintained and renewed.

XVIII.

The decision of *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 Pac. (2d) 460, held the license agreement to be void. The "Petition for Writ of Mandate" before the Court in that case was filed originally in the Supreme Court of the State of California on November 25, 1938. On November 28, 1938, said Supreme Court of the State of California transferred the case to the District Court of Appeal of the Third Appellate District of the State of California for hearing and determination. The decision was duly entered on April 12, 1939. On May 19, 1939, a Petition to the Supreme Court of the State of California for hearing after said decision was filed in said Supreme Court. Said application to have the cause heard in the Supreme Court after said judgment was denied by the Supreme Court on June 1, 1939. The Court, in the said case of *County of Alameda* v. *Ross, supra,* did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts the Court finds:—

I.

That the County of Alameda and the United States entered into a valid, binding contract, as evidenced by the Resolution adopted by the Board of Supervisors of said County on December 6, 1909; by the License issued by the Secretary of War on September 3, 1910; and the Resolution adopted by the Board of Supervisors of said County on November 10, 1913.

II.

That under said contract the said County of Alameda is obligated to maintain, operate, repair, or rebuild said Fruitvale Avenue Bridge.

III.

The County of Alameda is now estopped to set aside its contract with the United States to maintain, operate, repair or rebuild the Fruitvale Avenue Bridge.

IV.

The County of Alameda had and has authority to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge.

V.

Congress had and has power to authorize the County to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge.

VI.

The expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge were and are not gifts to a private corporation of public money prohibited by Section 31 of Article IV of the California Constitution.

VII.

The Contract between the County of Alameda and the United States does not violate Section 18 of Article XI of the Constitution of California forbidding a County to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year.

VIII.

The contract between the United States and the County of Alameda is not void for lack of mutuality.

IX.

The contract between the United States and the County of Alameda is not void for uncertainty.

X.

The courts of the State of California had no jurisdiction to determine substantial rights of the United States in

County of Alameda vs. *Ross,* 32 Cal. App. (2d) 135, 89 Pac. (2d) 460.

XI.

That the defendants Central Pacific Railway Company, and the Southern Pacific Company were and are not parties to said contract between the said County of Alameda and the United States.

XII.

That the counter claim of the defendant County of Alameda be dismissed and said defendant County take nothing thereby.

HAROLD LOUDERBACK
United States District Judge.

[Endorsed]: Filed Oct. 10, 1940.

(Tr. 246-272).

In the Southern Division of the United States District Court for the Northern District of California.

II.

IN THE SOUTHERN DIVISION
OF THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* vs. COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Political Subdivision of the State of California), CENTRAL PACIFIC RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY, *Defendants.*	No. 21467-L

DECREE

This cause came on regularly for trial before the Court sitting without a jury on the 21st and 22nd days of March, 1940; Messrs. Frank J. Hennessy, United States Attorney, William E. Licking, Assistant United States Attorney, and Brice Toole, Attorney, Department of Justice, appearing for the plaintiff, and Messrs. Ralph E. Hoyt, District Attorney, J. F. Coakley, Chief Assistant District Attorney, Robert H. McCreary, Assistant District Attorney, and Cecil Mosbacher, Deputy District Attorney, appearing for the defendant County of Alameda, and E. J. Foulds appearing for the defendants Central Pacific Railway Company and Southern Pacific Company, and the Court having heard the testimony and examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith; now, there-

fore, by reason of the law and findings aforesaid:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the defendant County of Alameda maintain, repair, and operate the Fruitvale Avenue bridge at its sole cost and expense;

2. That the County of Alameda rebuild said bridge at its sole cost and expense if the same should be burned, destroyed or become inadequate for the purpose it serves;

3. That the plaintiff and the defendants Central Pacific Railway Company and the Southern Pacific Company are required to pay nothing towards the maintenance, repair, operation or rebuilding of said bridge;

4. That the Court declares:

a. That the County of Alameda and the United States entered into a valid, binding contract under which the County of Alamdea became obligated to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge (which bridge is more fully described in the findings of fact filed herein), and the United States is relieved of all liability in respect thereto;

b. That the County of Alameda is now estopped to deny or question the validity of the contract between said County and the United States;

c. That the defendants Central Pacific Railway Company and Southern Pacific Company were and are not parties to the contract between the County of Alameda and the United States.

5. That the counterclaim of the defendant County of Alameda be and the same is hereby dismissed, and the United States have its costs expended herein.

October 21st, 1940.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Oct. 21, 1940.

(Tr. 272-274).

III.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE
NINTH CIRCUIT

COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Poltical Subdivision of the State of California), *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 9748.

STATEMENT OF THE POINTS ON WHICH APPELLANT COUNTY OF ALAMEDA INTENDS TO RELY UPON APPEAL.

The above entitled Court having made and entered a final judgment in the above entitled action in favor of the appellee United States of America and against the appellant County of Alameda on the 21st day of October, 1940, and the appellant County of Alameda having on the 17th day of January, 1941, taken its appeal from said final judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed in said Court the record on appeal together with a designation of the portions of said record to be printed, the appellant does hereby serve upon the appellee United States of America and the defendants, Central Pacific Railway Company and Southern Pacific Company, and hereby files with the above entitled Court a concise statement of the following points on which it intends to rely on said appeal:

I

That the fact set forth in paragraph V of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The Tidal Canal was not open to navigation" is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulation of facts filed in said action and in that the Court should have found in lieu of said fact the following fact: "The Tidal Canal was navigable in fact".

II

That the fact set forth in paragraph VII of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The defendant railroad companies claim no right or title in the Fruitvale Avenue bridge except those rights conferred upon them, or their predecessors, by the decree in *United States* v. *Crooks, et al.*" is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulation of facts filed in said action and in that the Court should have found in lieu of said fact the following fact: "The defendant railroad companies claim a right to have the Fruitvale Avenue Bridge operated, maintained, repaired and whenever necessary, replaced by the plaintiff under the decree in *United States* v. *Crooks, et al.*"

III

That the facts set forth in "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action are erroneous and insufficient in that from the evidence adduced at the trial and from the facts set forth in the stipulations of facts filed in said action the Court erred in not finding the following addition fact: "In the Rivers and Harbors Act, approved June 25, 1910, 36 Stat. 630, c. 382, it is provided, *inter alia,* as follows:

'Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer.' "

IV

That the fact set forth in paragraph XI of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made available to adjacent property owners, a twenty-five foot strip of property along each side of the Canal for the construction of wharves and warehouses" is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact:

"Between September 3, 1910, and November 10, 1913, the plaintiff installed electrical operating machinery on the said bridges and thereafter the bridges were operated, maintained and repaired by the County of Alameda instead of the plaintiff.

"In 1910 a harbor line survey was made for San Francisco Bay for the purpose of establishing harbor lines in said area pursuant to recommendation of the Board of Engineers of the United States Army and authorization of Congress previously made.

"In the making of said survey a survey made prior to

1876 for the purpose of the condemnation action of *United States* v. *Crooks, et al* was used in the preparation of the map of harbor lines of the Tidal Canal and San Leandro Point Area as shown on Map, or Sheet, No. 5 (Plaintiff's Exhibit 12).

"The endorsement on the "Maps of San Francisco Bay, Cal., showing Harbor Lines Prepared by the San Francisco Harbor Line Board 1912", including Plaintiff's Exhibit 12, read as follows:

'WAR DEPARTMENT

"Washington, Jany. 20 1913.

"The harbor lines shown and described on the accompanying maps, viz: San Francisco Nos. 1, 2 & 3, and San Francisco Bay Nos. 1 to 7 inclus. are approved to supersede all harbor lines previously approved for the localities shown thereon.

ROBERT SHAW OLIVER

Asst. Secretary of War.'

"The harbor lines thus approved were revocable at will by the Secretary of War and were in fact revoked in 1929 by the Secretary of War, at which time they were changed by moving the pierhead lines back to the bulkhead lines so that thereafter said lines were coterminous with the property lines of the property adjoining the Tidal Canal.

"The area between pierhead and bulkhead lines as shown on Plaintiff's Exhibit 10 was made available for use by adjoining property owners at the pleasure of the plaintiff and without special lease of any kind as shown by the endorsement on the title sheet of Plaintiff's Exhibit 9 reading as follows:

'WAR DEPARTMENT.

"Washington, June 3, 1913.

'The owners of property abutting the lands included in the right of way acquired by the United States for the Oakland Tidal Canal shown on accompanying

Sheet No. 5 are hereby authorized and permitted to occupy, with open-work non-permanent structures for wharf purposes, the portions of the strip of U. S. property fronting their respective properties and situated between the pierhead and bulkhead lines approved Jan. 20, 1913, without special lease or charges of any kind, it being expressly understood that this permission is revocable at any time when this area may be again required for purposes of navigation and shall not be construed as a relinquishment of the Government title to the said right of way.

HENRY BRECKINRIDGE
Asst. Secretary of War.' "

V

That the fact set forth in paragraph XVI of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 Pac. (2d) 460", should have read as follows:

"On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 Pac. (2d) 460. Said County subsequently agreed to operate said Bridge until March 31, 1940, but in so doing it was agreed that said County waived no rights, expressly retained all rights it might have in the premises, and that the position of the County of Alameda in this suit was not to be prejudiced in any way by such operation. It was further agreed that should said County subsequently agree to operate said Bridge after March 31,

1940, or should said County in any manner continue to operate said Bridge, that said County would thereby waive no rights, but would expressly retain all rights it might have in the premises, and that the position of the County of Alameda in this suit would not be prejudiced in any way by such operation or by such extension or extensions of time."

VI

That the fact set forth in paragraph XVIII of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The Court, in the said case of *County of Alameda* v. *Ross, supra,* did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909", is incomplete and erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact:

"The Court, in the said case of *County of Alameda* v. *Ross, supra,* did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909, but said resolution was incorporated in the resolution of the Board of Supervisors of the County of Alameda of November 10, 1913, which latter resolution was before said Court. The United States was notified by the District Attorney of the County of Alameda, as counsel for the County of Alameda, of the filing of said 'Petition for Writ of Mandate' in said action. Copies of all papers filed in said action by both petitioner and respondent, including the stipulation of facts and all briefs, were sent to and received by the United States Attorney in San Francisco during the proceedings and before the case was submitted."

VII

That the conclusion of law contained in paragraph I of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That the County of Alameda and the United States entered into a valid, binding contract, as evidenced by the Resolution adopted by the Board of Supervisors of said County on December 6, 1909; by the License issued by the Secretary of War on September 3, 1910; and the Resolution adopted by the Board of Supervisors of said County on November 10, 1913", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulation of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the resolution adopted by the Board of Supervisors of the County of Alameda on December 6, 1909, the license issued by the Secretary of War on September 3, 1910, and the resolution adopted by the Board of Supervisors of said County on November 10, 1913, did not constitute a valid contract and that neither the County of Alameda nor the United States is now or has ever been bound thereby.

VIII

That the conclusion of law contained in paragraph II of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That under said contract the said County of Alameda is obligated to maintain, operate, repair, or rebuild said Fruitvale Avenue bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that there

not being now and never having been a valid and existing contract between the United States and the County of Alameda, that the said County of Alameda is not now and never has been obligated to maintain, operate, repair or rebuild said Fruitvale Avenue Bridge.

IX

That the conclusion of law contained in paragraph III of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The County of Alameda is now estopped to set aside its contract with the United States to maintain, operate, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda for the said County to maintain, operate, repair or rebuild the said Fruitvale Avenue Bridge is *ultra vires* and that the said County of Alameda is not now and never has been estopped to set aside the said alleged contract.

X

That the conclusion of law contained in paragraph IV of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The County of Alameda had and has authority to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that neither the County of

Alameda nor its Board of Supervisors now has or ever has had the authority to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge.

XI

That the conclusion of law contained in paragraph V of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "Congress had and has power to authorize the County to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the Congress of the United States has not now and never has had the power to authorize said County of Alameda to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge.

XII

That the conclusion of law contained in paragraph VI of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge were and are not gifts to a private corporation of public money prohibited by Section 31 of Article IV of the California Constitution", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge are and always have

been gifts of public money or things of value to individuals and municipal or other corporations, prohibited by Section 31 of Article IV of the Constitution of the State of California.

XIII

That the conclusion of law contained in paragraph VII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the County of Alameda and the United States does not violate Section 18 of Article XI of the Constitution of California forbidding a County to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the County of Alameda and the United States violates Section 18 of Article XI of the Constitution of the State of California, which said constitutional provision forbids a county's incurring any indebtedness or liability exceeding in any year the income and revenue provided for such year.

XIV

That the conclusion of law contained in paragraph VIII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the United States and the County of Alameda is not void for lack of mutuality", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said

facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda is void for lack of mutuality.

XV

That the Court erred in not concluding as a matter of law that the alleged contract between the United States and the County of Alameda was void for lack of consideration and that neither of said parties is now or ever has been bound thereby.

XVI

That the conclusion of law contained in paragraph IX of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the United States and the County of Alameda is not void for uncertainty", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda is void for uncertainty, both because of the cancellation clause contained therein and because of the ambiguity of its provisions.

XVII

That the conclusion of law contained in paragraph X of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The courts of the State of California had no jurisdiction to determine substantial rights of the United States in County of Alameda vs. Ross, 32 Cal. App. (2d) 135; 89 Pac. (2d) 460", is erroneous in that said conclusion is contrary to the evidence adduced at

the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the judgment of the District Court of Appeal of the State of California in the matter of *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 P. (2d) 460, interpreting the statutes, constitutional provisions and case law of the State of California in regard to the powers and limitations of powers of boards of supervisors and counties and setting forth the substantive law of that State, is binding upon the United States District Court in the present action and that said Court is without authority to interpret said statutes, constitutional provisions and case law or to determine the said substantive law of said State contrary thereto.

XVIII

That the conclusion of law contained in paragraph XII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That the counter claim of the defendant County of Alameda be dismissed and said defendant County take nothing thereby", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the counterclaim of the defendant County of Alameda should be granted and that the United States is obligated to operate, maintain, repair and when necessary, to rebuild or replace said Fruitvale Avenue Bridge and that the County of Alameda is forever relieved, released and absolved of any obligation, liability, duty or responsibility in connection with the control, operation, maintenance, repair and rebuilding of said Fruitvale Avenue Bridge.

XIX

That the Court erred in not concluding as a matter of law that the alleged contract between the United States and the County of Alameda not specifying any time for which said County was bound to maintain, repair and if necessary, replace the Fruitvale Avenue, Park Street and High Street bridges, was contrary to public policy and void and/or that said contract being silent as to the time of its duration was substantially complied with after a reasonable time and/or that said contract having failed to specify the term for which the obligation was to continue, was terminable at the will of either party.

XX

That the Court erred in not concluding as a matter of law that equity will not enforce perpetual contracts or contracts which are uncertain as to the length of time of performance or compliance as to their terms.

XXI

That the Court erred in not concluding as a matter of law that equity should not decree specific performance of said alleged contract which is oppressive, unjust and unconscionable.

XXII

That the Court erred in admitting over the defendant County of Alameda's objection the report of G. H. Mendell, Major of Engineers, and others, dated at San Francisco, California, February 16, 1874 (Rep. Tr. p. 13).

XXIII

That the Court erred in refusing to admit in evidence the "Stipulation of Facts with Reference to Offer of Evidence by the Defendant, County of Alameda," together with Exhibit I attached thereto, which said exhibit contained a Statement of Motion for a New Trial on behalf of Defendant Alfred A. Cohen in the matter of *United States* v. *Crooks* (lodged March 21, 1940), which said exhibit set

forth the testimony of the witness Major G. H. Mendell given at the time of said motion in the matter of *United States* v. *Crooks, et al.*, which said testimony explained the report of the said Major Mendell of February 16, 1874, and set forth the details of the construction of said Tidal Canal and purposes for which said Tidal Canal was to be constructed and particularly the fact that said Tidal Canal was to be navigable.

XXIV

That the Court erred in refusing to admit in evidence the "Stipulation of Facts with Reference to Offer of Evidence by Defendant, County of Alameda," to the effect that Major G. H. Mendell, also known as George H. Mendell, Major of Engineers of the United States Army, referred to in the "Stipulation of Facts with Reference to Offer of Evidence by Defendant County of Alameda subject to Objection of Plaintiff as to Materiality" on file herein, was deceased prior to the commencement of this proceeding and during his lifetime was the same party named as defendant in the case of *United States* v. *Crooks, et al.*, which said Stipulation was lodged in the instant case on the 26th day of March, 1940.

XXV

That the Court erred in overruling the defendant County of Alameda's motion to strike from the record all testimony of the plaintiff's witness, Henry S. Pond, given on direct examination, which said motion was based on the ground that said evidence was incompetent, irrelevant and immaterial; that it did not involve any of the issues of said case; that it did not establish any consideration for the assumption of control by the County of Alameda of said bridges or any consideration for any alleged agreement between the said County and the United States Government, and that any such purported agreement between said County and said Government was void and illegal beacuse it was

beyond the power of the Board of Supervisors and contrary to the Constitution of the State of California in that it would constitute a gift of public funds to private corporations and an expenditure of public moneys in excess of the income provided for any one year (Rep. Tr. pp. 48-49).

XXVI

The Court erred in limiting the cross-examination of defendant County of Alameda of the plaintiff's witness, Henry S. Pond, in regard to leases by the United States Government of property along the Tidal Canal, to cross-examination concerning leases of lands lying between the High Street and Park Street bridges (Rep. Tr. 58-61).

XXVII

That the Court erred in ordering that judgment be entered in favor of plaintiff, The United State of America, on "Findings of Fact and Conclusions of Law" for the reason that said "Findings of Fact and Conclusions of Law" are each and every, all and singular contrary to the law and the evidence in the above entitled case and that, therefore, said decree is erroneous and should be set aside and said final judgment should be reversed and that the said United States Circuit Court of Appeals for the Ninth Circuit should order that judgment be entered for the defendant and appellant County of Alameda and that said defendant and appellant County of Alameda should have its costs expended herein.

Dated: February 17, 1941.

RALPH E. HOYT,
District Attorney in and for the County of Alameda, State of California,

J. F. COAKLEY,
Chief Assistant District Attorney in and for the County of Alameda, State of California,

ROBERT H. McCREARY,
Assistant District Attorney in and for the County of Alameda, State of California,

CECIL MOSBACHER,
Deputy District Attorney in and for the County of Alameda, State of California.

Attorneys for Appellant County of Alameda.

Service and receipt of a copy of the attached Statement of the Points on which Defendant and Appellant County of Alameda Intends to Rely on Appeal, is hereby admitted this 17th day of February, 1941.

FRANK J. HENNESSY,
U. S. Atty.
W. E. LICKING,
Attorneys for Appellee United States of America.

E. J. FOULDS,
Attorney for Defendants Central Pacific Railway Company and Southern Pacific Company.

[Endorsed]: Filed Feb. 17, 1941. Paul P. O'Brien, Clerk.

(Tr. 490-510).

IV.

RESOLUTION OF BOARD OF SUPERVISORS OF ALAMEDA COUNTY

December 6, 1909.

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA, ACCEPTING PARK STREET, FRUITVALE AVENUE AND HIGH STREET BRIDGES.

Whereas, there exists in the County of Alameda, State of California, over and across the United States Tidal Canal, certain draw bridges commonly known as the Park Street Bridge and Fruitvale Avenue Bridge, and the High Street Bridge, all of which bridges were constructed over said canal by, and belong to, and are the property of, the United States of America; and

Whereas, no provision has ever been made for the operation of said bridges by the United States Government; and

Whereas, that portion of said canal between said bridges has never been open to navigation; and

Whereas, the requirements of commerce and shipping would be materially benefited by the operation of said bridges, and the opening of said canal to navigation in such manner as to permit the passage of vessels in said canal; and

Whereas, Lieutenant Colonel John Biddle, U. S. A., in his report upon the improvement of rivers and harbors in the First San Francisco, California Districts, has recommended that the bridges hereinbefore referred to, to wit, the High Street Bridge, Fruitvale Avenue Bridge and the Park Street Bridge be turned over to the County of Alameda, provided that the County of Alemada thereafter assume all cost of repair, operation and replacement when necessary; and,

Whereas, the Honorable Joseph R. Knowland, Congressman from the Third District of California, has succeeded

in securing the recommendation of the War Department that permission be given to turn these bridges over to the County of Alameda; and,

Whereas, the City of Alameda, acting by and through its regularly constituted authorities thereunto duly authorized, has agreed to supply electric power for the operation of said bridges hereinabove referred to for the period of five years, without cost to the said County of Alameda, now, therefore,

Be It Resolved that the County of Alameda, by and through its Board of Supervisors thereunto duly authorized, hereby agrees to accept said bridges, to wit: The said Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge and to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges, and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the waterfront of the tidal canal and establish harbor lines so as to permit the construction of wharves and docks; and

Be It Further Resolved that a copy of this resolution be sent by this Board under seal of this Board to United States Senator George C. Perkins, Congressman Joseph R. Knowland, Lieutenant Colonel John Biddle, and to the City Clerk of the City of Alameda.

Passed and adopted by the following vote:

Ayes: Supervisors—Bridge, Foss, Mullins and Ch. Honrner. -4.

Noes: Supervisors—None.

Absent: Supervisor—Kelley.

I hereby certify that the foregoing is a true and correct copy of a Resolution adopted by the Board of Supervisors of Alameda, Cal., Monday, December 6th, 1909.

JOHN P. COOK,
County Clerk and Ex-Officia Clerk of the Board of Supervisors of Alameda County, Cal.
By H. M. WILSON,
Deputy Clerk
(Tr. 167-169).

V.

LICENSE

September 3, 1910.
J. A. G. O.
(27215)

Whereas, By the Act of Congress approved June 25, 1910, entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes" (Public—No. 264), and under the clause of appropriation therein for "Improving harbor at Oakland, California", it is provided, *inter alia,* as follows:

"Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities;

"Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer.'

Now, Therefore, Under the authority and discretion in him vested by the above-quoted provision of said Act of Congress, and in accordance with the recommendation

of the Chief of Engineers, United States Army, the Secretary of War hereby grants unto the Board of Supervisors of Alameda County, California, a license, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

This License is granted subjejct to the following conditions and provisions:

1.—That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any one of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2.—That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3.—That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4.—That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5.—That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic.

Witness my hand this 3rd day of September, 1910.

(Signed)

JOHN C. SCOFIELD,
Assistant and Chief Clerk, for the Secretary of War, in his absence.

(Tr. 170-172).

VI.

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA.

November 10, 1913.

Introduced by Supervisor .....

At meeting held Nov. 10, 1913.

Whereas, this Board of Supervisors, by resoultion heretofore adopted, agreed to accept certain draw bridges across the United States Tidal Canal in Alameda County, commonly known as the Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge, and assume all costs of future repair, operation and replacement of said bridges, provided that each of said bridges were placed in such condition and repair by the United States Government that said bridges, and each of them, might be operated by electricity, and that the United States should, under such terms and conditions as it might see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks; and

Whereas, subsequent to the adoption of said resolution, and on the 3rd day of Stepmber, 1910, the Srecretary of War, in accordance with the provisions of an Act of Congress, approved June 28, 1910, entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes" (Public No. 264), issued a license to the Board of Supervisors, revocable at will by the Secretary of War, to assume control of the said three bridges built

by the United States in connection with the improvement of Oakland Harbor, California, which said license was granted subject to the following conditions and provisions, to-wit:

1. That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2. That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3. That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery togther with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5. That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic; and

Whereas, the United States has put all three bridges in condition for opration of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished

bridge-tenders' houses and highway gates; and, also, overhauled all old machinery and put it in good order for operation, under the new conditions as required by paragraph 3 of said License, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

Be It Resolved that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the said three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor, to-wit, the Park Street Bridge, the Fruitvale Avenue Bridge and the High Street Bridge, subject to the conditions and provisions of the aforesaid License of September 3, 1910, said acceptance being effective from and after Monday, November 17th, 1913.

Adopted by the following vote:

Ayes: Supervisors—Bridge, Foss, Kelley, Murphy and Chairman Mullins. -5.

Noes: Supervisors—None.

Absent: Supervisors—None.

I, John P. Cook, County Clerk, and ex-officio Clerk of the Board of Supervisors of Alameda County, State of California, do hereby certify that the foregoing resolution hereunto attached is a true and correct copy of a resolution adopted by said Board of Supervisors of Alameda County, State of California, on Monday, November 10, A. D,. 1913.

JOHN P. COOK,
County Clerk and ex-officio Clerk of the Board of Supervisors of Alameda County, California.
By H. M. WILSON,
Deputy Clerk

(Tr. 172-176).

No. 9748

In the United States Circuit Court of Appeals for the Ninth Circuit

COUNTY OF ALAMEDA (A BODY CORPORATE AND POLITIC, AND A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA), APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

APPELLANT'S REPLY BRIEF

FILED
AUG 2 - 1941
PAUL P. O'BRIEN,
CLERK

RALPH E. HOYT,
District Attorney in and for the County of Alameda, State of California,

J. F. COAKLEY,
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ROBERT H. MCCREARY,
Assistant District Attorney,

CECIL MOSBACHER,
Deputy District Attorney,

Attorneys for Appellant County of Alameda.

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No. 9748

In the United States Circuit Court of Appeals for the Ninth Circuit

COUNTY OF ALAMEDA (A BODY CORPORATE AND POLITIC, AND A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA), APPELLANT,

VS.

UNITED STATES OF AMERICA, APPELLEE.

APPELLANT'S REPLY BRIEF

FACTS

This Honorable Court is respectfully referred to appellant's brief (12-16) for an accurate and complete Statement of Facts. Appellant will briefly refer to the following inaccuracies in the Facts set forth in appellee's brief.

1. Appellee states (3) ". . the County *offered to accept* responsibility to maintain, repair and replace the bridges . ." whereas the 1909 Resolution provided ". . that the County of Alameda . . *agrees to accept* said bridges . ." (R. 168).

2. The conclusion of law "and the canal was opened to navigation" (Appellee's Br. 3) is discussed in Section I of this brief (2-4). The record definitely contradicts the appellee's statement (3) that the electrical machinery was installed, harbor lines established, or a twenty-five-foot strip of land on either side of the Canal was made available to property owners *in accordance with the offer of the county.* There was no mention of harbor lines nor of a twenty-five-foot strip of land in the 1910 License (R. 170-172) or in the 1913 Resolution (R. 172-176), accepting the bridges *subject to the conditions and provisions of the* 1910 *License.* If the 1909 Resolution were an offer, then the 1910 License was a counteroffer because Conditions 1, 2, 4 and 5 of said License were entirely different from those of the 1909 Resolution. The establishment of pierhead and bulkhead lines and the granting of a revocable permission

(which was revoked about 1929 [R. 446]) to adjacent property owners to construct open-work, non-permanent structures in the area between said lines did not make available to such property owners a *twenty-five-foot strip of land* bordering each side of the Canal (R. 391, 440, 441). The establishment of harbor lines along the Tidal Canal was part of a general plan for the development of the entire San Francisco Bay area (R. 418, 441) and was for the protection of the navigable waters (R. 447) and was not consideration for the alleged contract. There is no evidence of any lease of any land after 1913 (R. 426).

3. The record does not show that federal aid was used to replace Park and High Street Bridges but it does show that the parties agreed that the arrangements under which these bridges were reconstructed and are now operated were of no significance to the present case (R. 135, 323, 331).

ARGUMENT

I

THE CANAL WAS OPEN TO NAVIGATION PRIOR TO 1913.

The finding of fact that in 1913 the United States opened the Tidal Canal to navigation is neither correct nor material. Prior to 1913 both the United States and private interests upon occasions opened and closed the bridges across the Tidal Canal for the passage of vessels. Boats, barges and scows plied up and down said canal (R. 251). The frequency of the "occasions" when the bridges were opened is immaterial since continuity of use does not determine navigability as a matter of law. [1] Fourteen authenticated instances of use in a century and a half have been held to be sufficient to establish the navigability of a stream. [2] In the instant case the Tidal Canal was eight to ten feet in depth and there was a clearance of twelve feet eight inches below the Fruitvale Avenue Bridge for the passage of vessels prior to 1909 (R. 131, 165, 250, 251).

1. **United States v. Appalachian Electric Power Co.,** 85 L. Ed. 201, 209.
2. **Economy Light and Power Co. v. United States,** (C.C.A. 7th) 256 Fed. 792, 797, 798, aff. 256 U. S. 113, 65 L. Ed. 847, 41 Sup. Ct. 409.

The Supreme Court has held that a lake three to six feet deep was navigable. [3] The particular mode of use, whether by steamboat, sailing vessel or flatboat, does not determine the fact of navigability. [4]

Nor is the presence of an artificial obstruction such as a bridge which can be abated sufficient to prevent the stream's being navigable in law if it would be navigable in fact in its natural state. [5] The agreed facts are sufficient to establish the navigability of the Tidal Canal prior to 1913 within the generally accepted definition of navigability as set forth in *The Daniel Ball.* [6] The endorsement on the Title Sheet (R. 379) states "this permission (to occupy the lands between the pierhead and bulkhead lines) is revocable at any time when this area may be *again* required for purposes of navigation." (Emphasis added.) The United States Supreme Court, in holding navigable a river along portions of which there were only isolated bits of boating and where it was necessary to pull or push the boat more than a mile and a quarter, recently defined navigable waters as those "which either in their natural or *improved* condition" are used or are *suitable for use,* even though such improvements were not actually completed or even authorized.[7] If the Tidal Canal were made navigable merely by opening and closing the Fruitvale Avenue Bridge at more frequent intervals, and this is the only evidence in the record of any improvement of the Canal, then the Canal was certainly navigable prior to 1913 within the foregoing rule.

Since neither the 1909 Resolution, the 1910 License nor the 1913 Resolution suggested that the opening of the Canal to navigation was the consideration for the county's assuming the cost of operating, maintaining, repairing or replacing the bridges, the fact, if it were a fact, that the

3. **United States v. Holt State Bank,** 270 U. S. 49, 56, 70 L. Ed. 465, 46 Sup. Ct. 197; see also **Welder v. State,** (Tex.) 196 S. W. 868, 873.
4. **United States v. Holt State Bank, supra; Schermerhorn v. Dozier,** (C. C. A. 4th 1918) 251 Fed. 839, 841, 842.
5. **Economy Light and Power Co. v. United States, supra.**
6. 10 Wall 557, 563, 19 L. Ed. 999, 1001.
7. **United States v. Appalachian Electric Power Co.,** 85 L. Ed. 201, 212, 213.

Canal was not open to navigation prior to 1913, is immaterial. The only reference to the Canal's not being open to navigation is a recital in the 1909 Resolution, which recital forms no part of the contract. [8]

The record does not set forth what was done to "open the Canal to navigation." Since the only thing done or purported to be done to lessen the obstruction to navigation which a slowly opening bridge necessarily caused, was done by Alameda County's maintaining the necessary number of bridge tenders to promptly open and close the bridges (Condition 5, License, R. 218), if either party "opened the Canal to navigation" then the County of Alameda did so and not the United States Government. The Government's only contribution to the navigability of the Tidal Canal was granting to the county a revocable license to operate the bridges. Therefore, a finding that the Canal was or was not open to navigation prior to 1913 does not lend any additional support to the government's claim that it has furnished adequate consideration for the promise of the county to operate and maintain the bridges.

II

THE COUNTY OF ALAMEDA DID NOT ENTER INTO A VALID, BINDING CONTRACT TO OPERATE AND MAINTAIN THE FRUITVALE AVENUE BRIDGE.

(A) The License Was Not an Acceptance of Any Offer of the County of Alameda Contained in the Resolution of 1909.

On pages 85 to 87 of its brief appellant has set forth the reasons why the License of 1910 was not an acceptance of an offer of the County of Alameda to operate the bridges contained in the 1909 Resolution. By the 1909 Resolution the county *agreed to accept* the bridges provided they were placed in such condition and repair by the Government that they might be operated by electricity and provided, further, that the United States should, under such terms and condi-

8. **Ross v. Ross,** 233 App. Div. 626, 253 N. Y. Supp. 871, 882; **Jones v. City of Paducah,** 283 Ky. 628, 142 S. W. (2d) 365, 367; **Simpson v. Anderson,** (N. J.) 70 Atl. 696, 698.
The appellee concedes that a recital is no part of the contract in discussing the Rivers and Harbors Act set forth in the 1910 License (Appellee's Br. 36, 37).

tions as it saw fit, lease the waterfront of the Tidal Canal and establish harbor lines. The 1910 License made no reference to the establishment of harbor lines nor the leasing of the waterfront, but stated that the License was granted subject to five conditions, only the third of which, to-wit, the electrification of the bridges, was the same condition as in the 1909 Resolution. Space does not permit discussion of Conditions 1, 2, 4 and 5 in detail, but the Court's attention is directed to each of these conditions (R. 171, 172) and to the variance between the conditions contained in the License and those contained in the 1909 Resolution (R. 167-169). The 1913 Resolution (R. 172-176) reiterates the conditions subject to which the License was granted, refers to the fact that the United States has furnished and installed electrical machinery under the *"new conditions* as required by paragraph 3 of said License," (R. 175) and provides that the Board of Supervisors does accept and assume control of the three bridges *subject to the conditions and provisions of the aforesaid License of* 1910 (R. 175). The appellant, therefore, submits that the License was not an acceptance of the offer, if any, made by the County of Alameda in 1909, and that if the negotiations between the United States Government and the County of Alameda between the years 1909 and 1913 constitute any contract, even though a void or voidable one, then the 1910 License must be considered as a counteroffer.

(B) The County of Alameda Has Not Now and Never Has Had the Authority to Operate and Maintain the Fruitvale Avenue Bridge.

The appellee in its brief (9) concedes that counties cannot act beyond the *express* or *implied* powers granted by their charters or by legislative acts. Since appellee can find no *express* power whatsoever whereby the county was, or is, authorized to enter into or perform the alleged contract in question, it is forced to search for an *implied* power

concealed in some power expressly granted by such charter or legislative act.

Of the multitude of statutes in California concerning county highways and bridges, this quest has resulted in appellee's citing only section 32 of the Charter of Alameda County (Appellee's Br. 10). Appellee relies solely upon this section to convince this Court that the County of Alameda was *impliedly* empowered to enter into the purported contract. Since section 72 of said Charter provides that "This Charter shall take effect immediately upon its approval by the Legislature" and since such approval did not occur until January 18, 1927,[1] said section 32 was not even in existence until at least fourteen years subsequent to the time said contract is alleged to have been executed.

Since appellee has conceded that counties cannot act beyond *express* or *implied* powers granted by charter or by legislative act, and since the appellee has cited no *express* or *implied* power so granted whereby the county was authorized to enter into said contract, it is respectfully submitted that it must be conceded and held that such contract was clearly *ultra vires* and void.

It is furthermore submitted that even had section 32 been in existence in 1909 or 1913 the power to operate, maintain, repair and replace the Fruitvale Avenue Bridge could not be implied even from the strained construction placed on said section by the appellee. Since said section, so far as pertinent here, merely provides in the most general terms that *the County Surveyor,* under regulations of the Board of Supervisors, shall "have direction and control over all work construction, maintenance, and repair of roads, . . . and bridges," it is submitted that it cannot be reasonably implied, or implied at all, that *the Board of Supervisors* of the county was thereby granted the power to forever bind the County of Alameda to operate, main-

1. Cal. Stats., 1927, Concurrent and Joint Resolutions and Constitutional Amendments, Ch. 10, p. 2029, filed with Secretary of State January 18, 1927.

tain, repair and when necessary rebuild a combination railroad, vehicular and pedestrian bridge belonging to the United States, located on and over land belonging to the United States, under an alleged agreement expressly and solely revocable at the will of the Secretary of War.

The appellee states in its brief (11) that "the authorities cited by the appellant are not in point since all of them deal with situations where the county was clearly acting outside of the scope of any express or implied authority." The appellant has cited and discussed numerous decisions wherein courts have held various powers not to have been implied in certain legislative acts where such power might more reasonably have been implied than could the power of the county to enter into the contract in question be implied from the general language contained in said section 32. For example, the statutory authority of a board of supervisors to "lay out, maintain, control and manage public roads, ferries and bridges within the county" has been held not to empower a county to spend its funds on a federal road, [2] and a legislative act authorizing the City of Oakland to construct a bridge across the estuary was held not to authorize the city to construct a bridge on private land. [3] Nor has the appellee cited a single decision in support of its contention that the implied power alleged to be vested in the county by virtue of said section 32 impliedly empowered the county to execute the alleged contract.

In answer to appellee's quotation from 1 Dillon on *Municipal Corporations,* page 452 (Appellee's Br. 11) appellant refers to the following language therefrom:

> ". . . Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied . . ." [4]

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2. **Board of Sup'rs of Apache County v. Udall,** 38 Ariz. 497, 506-509, 1 P. (2d) 343, 347, 348.
3. **Pacific Bridge Co. v. Kirkham,** 54 Cal. 558, 560.
4. 1 **Dillon on Municipal Corporations,** (5th Ed.), Sec. 237, pp. 449, 450.

Section 32 cannot reasonably be construed to contain the implied power as urged by the appellee. However, assuming, for the sake of argument only, that there is any "doubt" concerning the existence of such implied power then such power must be denied.[5]

Appellee's statements concerning the operation and maintenance of the High and Park Street Bridges (Appellee's Br. 12) are in direct violation of the oral (R. 323, 331) and written (R. 135) agreement between the parties hereto. Furthermore, since this action involves *solely* the Fruitvale Avenue Bridge, it is difficult to see what significance can be attached to appellant's operating *two other bridges* "under other arrangements."

III

CONGRESS HAS NOT NOW AND NEVER HAS HAD POWER TO AUTHORIZE THE COUNTY OF ALAMEDA TO MAINTAIN THE FRUITVALE AVENUE BRIDGE.

The appellee has failed to cite any authorities in answer to the appellant's contention that Congress has not now and never has had the power to authorize the County of Alameda to maintain the Fruitvale Avenue Bridge (Appellant's Br. 75-80). The excerpt on page 12 of appellee's brief supposedly from the case of *Luxton* v. *North River Bridge Co.,* 153 U. S. 525, does not appear in that case but does appear in a footnote on page 1603 of 3 Dillon, *Municipal Corporations* (5th Ed.), for the limited proposition that the United States Government has the power of eminent domain which it may exercise either directly or through a corporation created for that purpose.

In the two other cases cited by appellee in this section of its brief [1] the City of St. Louis already possessed the statutory power to build the bridge in question and Congress merely extended to it the *privilege,* not the *power,*

5. 20 Corpus Juris Secundum, **Counties,** Sec. 82, p. 852 (see also 15 Corpus Juris, **Counties,** Sec. 103, p. 458); 18 Cal. Juris., **Municipal Corporations,** Sec. 107, p. 801; 43 Corpus Juris, **Municipal Corporations,** Sec. 192, pp. 195, 196.

1. **Haeussler v. St. Louis,** 205 Mo. 656, 103 S. W. 1034; **Latinette v. City of St. Louis,** (C.C.A. 7th 1912) 201 Fed. 676.

of eminent domain which provided the *means* for the exercise of that existing power. So in the instant case although Congress could grant to the county a license to operate the Fruitvale Avenue Bridge over navigable waters of the United States, such license did not empower the county to do so in the absence of a grant of such power by charter or the legislature of the state. A municipal corporation such as a county derives none of its powers from the United States. It is a creature of the state in which it exists and has only such powers as the state has given it. [2]

The Government removed one obstacle to the county's temporarily assuming control of the bridges across navigable waters by the granting of a revocable license, but it could not and did not empower the county to expend the taxpayers' money to operate, maintain, repair and replace the Fruitvale Avenue Bridge for all future time.

IV

THE EXPENDITURES MADE BY THE COUNTY TO OPERATE AND MAINTAIN THE FRUITVALE AVENUE BRIDGE WERE GIFTS TO A PRIVATE CORPORATION OR THE UNITED STATES OF PUBLIC MONEY PROHIBITED BY SECTION 31 OF ARTICLE IV OF THE CALIFORNIA CONSTITUTION, AND WERE IN VIOLATION OF THE "DUE PROCESS" CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

Appellee in its brief (16, 17) contends that since the contract is between the county and the United States, the county moneys expended on the Fruitvale Avenue Bridge are not a gift to a private railroad corporation but were expended in compliance with the contract between the county and the United States. However, this is precisely what the decisions discussed by appellant in its brief (42-52) hold to be illegal as trying to accomplish indirectly what cannot be done directly. If it were otherwise any such alleged license agreement involving *"the evils which the constitutional restriction was designed to prevent"* would afford *"a ready means of accomplishing by indirection what could not be*

2. **Arkansas-Missouri Power Co. v. City of Kennett** (C.C.A. 8th 1935) 78 Fed. (2d) 911, 922.

done openly and avowedly."[1] The appellee cites no decision to the contrary or in support of its contention.

Furthermore, the expenditure of county funds for the *benefit* received by a *private* railroad corporation is clearly the use or diversion of public funds for a *private purpose* as distinguished from a *public purpose* regardless of the means adopted to accomplish such purpose.

The appellee in its brief (18) states that due to the alleged omission of the 1909 Resolution the court in *County of Alameda* v. *Ross,*[2] was misled into concluding that

> "The installation of electrical apparatus by the Government for the opening and closing of the drawbridges, *under the terms of the License prior to its execution.* (Italics supplied.)

did not furnish an independent consideration."

This is an absolute misstatement of the court's holding, as shown by the following actual quotation (from which appellee only quoted the portion best suited for its purpose):

> *"There is no merit in the petitioner's contention* that the installation of electrical apparatus by the government for the opening and closing of the drawbridges, under the terms of the license prior to its execution, furnishes an independent consideration which makes the agreement binding. It still lacks mutuality." (Emphasis added.)[3]

It is submitted that the 1909 Resolution was not "the key fact in the situation" and it was wholly immaterial whether the said court in *County of Alameda* v. *Ross, supra,* had said Resolution before it since the fact would obviously remain that the expenditure of county funds on said bridge is for the *benefit* of a *private* railroad corporation. While true that the United States was not a party to said action, nevertheless it was notified of the filing of said

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1. **Higgins v. San Diego Water Co.,** 118 Cal. 524, 546, 547, 45 Pac. 824, 828, 829, 50 Pac. 670.
2. 32 Cal. App. (2d) 135, 89 P. (2d) 460.
3. 32 Cal. App. (2d) 135, 146, 89 P. (2d) 460, 465.

action and the United States Attorney in San Francisco received copies of all papers filed therein during the proceedings and before the case was submitted (R. 142).

Appellee made no reply whatever to appellant's contentions and authorities to the effect that such an expenditure of county funds in aid of a *private* railroad corporation violated the "due process" clause of the Constitution (Appellant's Br. 50, 51) or that said alleged contract was void as providing for an unconstitutional gift to the United States (Appellant's Br. 52-54).

V

THE ALLEGED CONTRACT VIOLATES SECTION 18 OF ARTICLE XI OF THE CONSTITUTION OF CALIFORNIA FORBIDDING A COUNTY TO INCUR ANY INDEBTEDNESS EXCEEDING IN ANY YEAR THE INCOME AND REVENUE PROVIDED FOR SUCH YEAR and

VI

THE ALLEGED CONTRACT IS VOID FOR LACK OF MUTUALITY.

Appellee's answers to appellant's contentions that the conclusions of law, first, that the alleged contract did not violate Section 18 of Article XI of the Constitution of California, and, second, that said alleged contract was not void for lack of mutuality, were erroneous, will be discussed together for the reason that under the facts of this case both conclusions of law cannot be correct. To contend that the alleged contract was valid on the ground that it did not violate Section 18 of Article XI of the Constitution because the promise of the county to operate, maintain, repair and replace the Fruitvale Avenue Bridge was in consideration of the use and occupation of the Bridge is to admit that the alleged contract is void because the license was expressly revocable at the will of the Government. To claim that the consideration for the alleged contract was the electrification of the bridges, so as to escape the consequences of lack of mutuality, is to admit that the consideration was executed prior to 1913, that the county then and there became obligated for all time to operate, maintain, repair and replace

the Fruitvale Avenue Bridge, the time of payment only being postponed, and that the said contract therefore violated Section 18 of Article XI of the Constitution.

The appellant challenges the following statement of the appellee (Appellee's Br. 21):

> "In other words, it is agreed that in no one year did the county become obligated beyond the constitutional limits."

The Agreed Statement of Fact reads:

> "The total cost of maintaining, operating or replacing said Bridges since November 17, 1913, has exceeded the income and revenues provided for the fiscal year 1913-14, or any fiscal year prior thereto. . . ." (R. 137.)

Whether the county became obligated beyond the constitutional limit in any one year is the question before this Court, the very crux of this entire law suit. If it did, the alleged contract was void because it violated Section 18 of Article XI of the Constitution (Appellant's Br. 29-41). If it did not, the alleged contract is void for lack of mutuality (Appellant's Br. 85-95).

On page 25 of its brief, in order to avoid the inevitable conclusion that the contract was void because it imposed upon the county a liability in excess of the income and revenue for the year 1913-14 which would follow if the electrification of the bridges were the consideration for its execution, the appellee stated:

> "It is submitted that the contract between the County and the United States is valid because each year's expense is within the County's income, and the expense incurred each year is *in consideration of the occupation and use of the bridge by the County for such year.*" (Emphasis added.)

On page 27 of its brief in support of the proposition that the alleged contract is not void for lack of mutuality the appellee stated:

> "It is the position of the appellee that a fair and reasonable interpretation of the Resolution of 1909, License of 1910, and its *acceptance* by the Resolution of 1913, leads to the conclusion that *electrification of the bridge by the United States at the request of the county was the consideration for the promise by the county to thereafter operate and maintain it.*" (Emphasis added.)

The appellee next argues that if appellant's contention is correct that the control of the bridges was the consideration for the promise of the county to maintain and operate the same, then the contract can be sustained on the theory that it was a unilateral contract which ripened into a binding obligation upon performance by the United States, to-wit, "the turning it over to the County" (Appellee's Br. 30). Whereas a unilateral contract originally lacking mutuality may become binding upon its complete execution, such a rule of law would not apply where the consideration was a continuing license, and where the offeror at all times retained the right to revoke or terminate the same. Such revocable control could furnish no consideration for either a bilateral or a unilateral contract.

The appellee states on page 27 that "the fact that there was a second or subsidiary consideration in the form of a license authorizing the county to operate the bridge did not destroy the mutuality of the contract." This argument is fallacious. If the county became bound upon the electrification of the bridges, then the alleged contract was void from the beginning because it violated Section 18 of Article XI of the Constitution, and a revocable license, which alone could never have supported a valid contract, could not have validated a void one.

On page 35 of its brief appellee states:

> "It is submitted that such an interpretation (that the contract is to remain in force so long as the Secretary of War does not revoke it) would work no

hardship on the County since the obligation of the County would cease immediately that the license was revoked. . . ."

This is clearly an admission that the license was the consideration for the alleged contract, and that said contract was lacking in mutuality.

VII

THE ALLEGED CONTRACT IS VOID FOR UNCERTAINTY.

(A) The Alleged Contract Is Void for Uncertainty Because the License Is Revocable at the Will of the United States Government.

The appellant's argument that the alleged contract was void for uncertainty is not answered by the appellee's contention that it is not to be presumed that the parties meant to do a "vain and meaningless thing" (Appellee's Br. 33). The intent of the parties was to do exactly what the appellee admits they did—enter into a license agreement which was "to remain in force so long as the Secretary of War does not, in the exercise of its general powers, revoke the license" (Appellee's Br. 35). Under such an agreement, however, both parties have the privilege of revocation (Appellant's Br. 85-95).

The cases cited by appellee for the proposition that the fact that the contract does not provide for a definite time for its termination does not render it void for uncertainty do not support its argument. In *Noble* v. *Reid-Avery Co.*,[1] not the will or whim of the promisor, but some external condition or standard beyond his control determined the time for which the contract was to continue. In *Sutliff* v. *Seidenberg, et al,*[2] an action to recover for services already rendered, the indefiniteness of the duration of the contract was not even discussed.

In the instant case the grantor of the license, the United States Government, had the *exclusive* power to continue or terminate the license even had the contract not expressly so provided (Appellee's Br. 37). Attention is called to the

1. 89 Cal. App. 75, 64 Pac. 341.
2. 132 Cal. 63, 64 Pac. 131.

cases cited in appellant's brief (95-101), and particularly to the quotation from Williston to the effect that "one of the commonest kinds of promises too indefinite for legal enforcement is where the promisor retains an unlimited right to decide later the nature or extent of his performance." [3] In view of the "paramount power" (Appellee's Br. 38) of the United States over navigable waters, it is submitted that a grant of a revocable license to construct or operate a bridge over such waters, would never be a sufficient consideration for a valid contract.

(B) The Alleged Contract Is Void for Ambiguity.

The fact that the provision in the license that the bridge should be under the supervision of the Engineer District amounts to nothing more than a statement of the law, since Congress always had power to supervise bridges over navigable waterways, does not cure the ambiguity of its terms, but rather substantiates the appellant's claim that the *degree* of control of the bridges, if any, which was granted to the County of Alameda was so uncertain and illusory as to be insufficient to serve as a consideration for the alleged contract here sought to have specifically performed.

VIII

THE COUNTY IS NOT ESTOPPED TO SET ASIDE THE ALLEGED CONTRACT TO MAINTAIN, OPERATE, REPAIR AND REBUILD THE FRUITVALE AVENUE BRIDGE.

On page 40 of its brief appellee states, "It is true that a county may not be estopped unless it was acting within the scope of its authorities . . ." The appellant submits that the county was not acting within the scope of its authority for the following reasons:

1. The county does not possess the express or implied power to operate, maintain, repair and replace a bridge owned by the United States Government, crossing navigable waters, for the benefit of the Government and a private railroad corporation (Appellant's Br. 16-29, Appellant's Reply Br. 5-8).

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3. 1 Williston, **Contracts** (Rev. Ed. 1936), Sec. 43, p. 123.

2. Section 18 of Article XI of the California Constitution expressly prohibits said county from incurring the liability contemplated under said alleged contract, which was in excess of the income for the year 1913-14 or any year prior thereto (Appellant's Br. 29-41, Appellant's Reply Br. 11-14).

3. Section 31 of Article IV of the California Constitution and the "due process" clause of the United States Constitution prohibit the county from making such a gift of its tax moneys to a *private* railroad corporation or to the United States (Appellant's Br. 42-54, Appellant's Reply Br. 9-11).

4. The said county and its board of supervisors were prohibited from entering into a perpetual contract (Appellant's Br. 54-75, Appellant's Reply Br. 19-20).

In the case of *County of Sacramento* v. *Southern Pacific Co.,* [1] the county was not without the power to execute the contract nor was it void because it conflicted with any statutory law of the state or because it was contrary to public policy. [2] Furthermore, in that case where the county sought to recover back money already paid, it did not have to meet the various equitable defenses which Alameda County may urge against the specific performance of the contract here sought to be enforced.

The appellee's reference to the "benefits" of the improvements made by the United States and the "valuable property rights" given up by the Government (Appellee's Br. 39, 40) finds no support in the record. The Resolution of 1913 merely recited that the United States had performed all the things required by it to be performed *under the terms of the license* (R. 221). Neither the License nor the Resolution of 1913 made any mention of establish-

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1. 127 Cal. 217, 59 Pac. 568.
2. Cases distinguishing **County of Sacramento v. Southern Pacific Co., supra,** are **County of Tehama v. Sisson,** 152 Cal. 167, 177, 92 Pac. 64, 69; **Reams v. Cooley,** 171 Cal. 150, 153, 152 Pac. 293, 294; **County of Shasta v. Moody,** 90 Cal. App. 519, 523, 265 Pac. 1032, 1034; **County of Marin v. Messner,** 44 A.C.A. 626, 639.

ing harbor lines or making available the land along the Canal. So far as either of these things were done, they were gratuitous acts on the part of the Government, revocable at will, which extended to the entire Bay Area (R. 418, 441) and were an exercise of its power over inter-state commerce. [3] There is no evidence of any leasing subsequent to 1913 (R. 425-427, 442). The electrification of the bridges was the only improvement made by the Government other than the drawing of some pierhead and bulkhead lines on a map based on a survey made in the eighteen-seventies (R. 417, 418) and the extending to the county of a revocable permission (which actually was revoked about 1929 [R. 444, 446]) to erect open-work, non-permanent structures between the pierhead and bulkhead lines.

When the appellee speaks of the "benefits" (Appellee's Br. 42) the county has enjoyed, it loses sight of the fact that the Government expended $21,358.80 for the electrification of the bridges and thereby shifted to the county its legal obligation of maintaining the bridges from July 1, 1913, to July 1, 1939, at a cost of $703,066.45. If the equities were balanced the Government would be found to have been repaid some thirty-three times from 1913 to 1939. Since the Government was bound by the *Crooks* decree (R. 19-23) to maintain "suitable" bridges the appellee must concede that at some time between 1913 and the present time the Fruitvale Avenue Bridge would have become obsolete and would have had to be electrified, repaired and eventually replaced. By granting a revocable license to use the land between the pierhead and bulkhead lines the United States gave up no property rights, certainly not "valuable" ones.

3. Article I, Section 8, Clause 3, United States Constitution.

IX

THE UNITED STATES DISTRICT COURT SHOULD HAVE CONCLUDED THAT THE DECISION IN COUNTY OF ALAMEDA v. ROSS,[1] INTERPRETING THE STATUTES, CONSTITUTIONAL PROVISIONS AND CASE LAW OF CALIFORNIA WAS BINDING UPON SAID DISTRICT COURT.

The District Court should have concluded as a matter of law that the decision of *County of Alameda* v. *Ross*[2] interpreting the statutes, constitutional provisions and case law of California in regard to the powers of boards of supervisors and counties therein was binding upon said District Court in the present action. The appellee urges that the case of *Erie Railroad Co.* v. *Tompkins*[3] does not apply to cases involving federal questions and that the instant case is of that type. A "federal question" is one arising under the treaties, federal statutes or Constitution,[4] and the fact that the United States is a party does not necessarily mean that a federal question is involved.

The appellee cites *Byron Jackson Co.* v. *United States*,[5] for the proposition that the rule of the *Erie Railroad Co.* case does not apply to an action on a contract where the United States government is the defendant (Appellee's Br. 45, 46). It is not established that the rule of the *Byron Jackson Co.* case correctly states the present law since other United States District Courts, in one instance in a later case[6] and the United States Circuit Court[7] in a case involving contract law, have applied the rule of the *Erie Railroad Co.* case to cases where the United States was a party.

Whether the rule of the *Byron Jackson Co.* case is correct is immaterial since on all questions involving general law such as lack of mutuality, perpetual contracts and estoppel, the law of the federal courts agrees with that of the

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1. 32 Cal. App. (2d) 135, 89 P. (2d) 460.
2. Ibid.
3. 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817.
4. **White Swan Mines v. Balliet,** (C.C.S.D. Iowa 1905) 134 Fed. 1004, 1005; **United States v. Douglas,** 18 S. E. 202, 113 N. C. 190.
5. (D. C. S. D. Cal. 1940) 35 Fed. Supp. 665.
6. **Carr v. United States** (D.C.W.D. Ky. 1939) 28 Fed. Supp. 236, 243; **United States v. Security-First National Bank of Los Angeles** (D.C.S.D. Cal. 1939) 30 Fed. Supp. 113, 119; **United States v. Rogers and Rogers** (D.C.D. Minn. 3rd 1941) 36 Fed. Supp. 79, 80.
7. **United States v. Brookridge Farm** (C.C.A. 10th 1940) 111 Fed. (2d) 461.

California courts, and since there is no question that the interpretation of the state courts of the constitution and statutory provisions concerning the existence and extent of the powers of political subdivisions of the state is controlling on the federal courts. Since Chief Justice Marshall laid down the rule that the construction given by the courts of the several states to the legislative acts of those states is received as true by the United States courts,[8] the federal courts have held that the judgment of state courts on such matters is conclusive.[9]

When the federal government enters into a contract with a private citizen its rights and obligations are governed by the same principles of law which are applicable to like contracts between individuals.[10] Appellant submits that the rules of law set forth in the case of *County of Alameda* v. *Ross,* are controlling in the federal courts because they reaffirm former interpretations of the statutory and constitutional provisions of the state defining and limiting the powers of a county therein, and because the decision is based upon general principles of law which are not only well established by the California courts but which are in perfect accord with the general law as set forth in the federal decisions. The case has the added value of presenting a set of facts identical with those now before this court, and the interpretation of state law in relation thereto.

X

FURTHER CONTENTIONS OF APPELLANT WHICH APPELLEE HAS NOT ANSWERED AND WHICH NECESSITATE A REVERSAL OF THE JUDGMENT OF THE DISTRICT COURT.

The appellee completely neglected to attempt to answer the following sections of appellant's brief:

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8. **Elmendorf v. Taylor,** 10 Wheat 152, 158, 6 L. Ed. 289.

9. **Senn v. Tile Layers Protective Union,** 301 U. S. 468, 477, 57 Sup. Ct. 857, 861, 81 L. Ed. 1229; **Florida Power and Light Co. v. City of Miami** (C.C.A. 5th 1938) 98 Fed. (2d) 180, 182.

10. **Reading Steel Casting Co. v. United States,** 268 U. S. 186, 188, 45 Sup. Ct. 469, 69 L. Ed. 907; **United States v. National Exchange Bank,** 270 U. S. 527, 534, 46 Sup. Ct. 388, 70 L. Ed. 717; **Cory Bros. & Co. v. United States** (C.C.A. 2d 1931) 51 Fed. (2d) 1010, 1012.

IV

The Court Erred in Not Concluding as a Matter of Law that the Alleged Contract Between the United States and the County of Alameda, Not Specifying Any Time for Which Said County Was Bound to Operate, Maintain, Repair and if Necessary, Rebuild the Fruitvale Avenue Bridge, Was Contrary to Public Policy and Void and/or Was Substantially Complied With After a Reasonable Time and/or Was Terminable at the Will of Either Party.

X

The Court Erred in Not Concluding as a Matter of Law that Equity Will not Decree Specific Performance of an alleged Contract Which Is Oppressive, Unjust and Unconscionable.

The appellant discussed the matters set forth in Section IV and the proposition that a court of equity will not decree specific performance of a perpetual contract on pages 54 and 75 and Section X on pages 107 to 114 of its opening brief, citing a number of well established United States Supreme Court cases.

The rules of law and equity contained in either of the above sections, none of which have been or can be challenged by the appellee, are sufficient within themselves to warrant this Honorable Court's reversing the judgment of the United States District Court in the present action.

CONCLUSION.

Appellant County of Alameda respectfully prays for a reversal of the erroneous and inequitable decree of the United States District Court and that its counterclaim and costs be allowed.

Dated: August 21, 1941.

Respectfully submitted,

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No. 9748

In the United States Circuit Court of Appeals for the Ninth Circuit

COUNTY OF ALAMEDA (A BODY CORPORATE AND POLITIC, AND A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA), APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR THE APPELLEE

FILED
JUL 24 1951
PAUL P. O'BRIEN, CLERK

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In the United States Circuit Court of Appeals for the Ninth Circuit

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No. 9748

COUNTY OF ALAMEDA (A BODY CORPORATE AND POLITIC, AND A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA), APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR THE APPELLEE

This is an appeal from a final decree of the Southern Division of the United States District Court for the Northern District of California, filed on October 21, 1940, and ordering the specific performance of a contract between the County of Alameda and the United States under which contract the county was obligated to operate, maintain, and repair a drawbridge situated at Fruitvale Avenue, between the cities of Oakland and Alameda, in Alameda County, California.

FACTS

This is an action brought by the United States against the County of Alameda, the Central Pacific Railway Company, and the Southern Pacific Company, for the specific performance of a contract between the

United States and said County, and to have the rights of all parties defined and declared.

The facts are as follows:

In 1882 the United States condemned certain land situated in Alameda County, California, for the improvement of Oakland Harbor, by the construction of a tidal canal (R. 129). The County of Alameda, The Southern Pacific Company, and others, were defendants in that proceeding. The decree of condemnation was rendered by the Superior Court of Alameda County, and recited in part:

> It is further ordered, adjudged, and decreed that in the construction of said canal, the plaintiff (United States) at its own expense construct and keep in repair suitable bridges across the same on all roads now used as public highways crossing the line of said canal, and also suitable railroad bridges on the present railroad tracks crossing the line of said canal (R. 165).

The canal runs between the cities of Oakland and Alameda, and, in accordance with the decree mentioned above, the United States constructed two highway bridges at Park Street and High Street, and a combined highway and railroad bridge at Fruitvale Avenue (R. 131–132). It is the latter bridge that is the subject of the present controversy. All three bridges were constructed as drawbridges, but were equipped only with hand-operated machinery, and it took approximately 30 minutes to open and 30 minutes to close each of these bridges. After they were

equipped with electrical operating machinery, as hereinafter set forth, it took from 2 to 3 minutes to open, and the same time to close, each bridge (R. 132).

In 1909 the Board of Supervisors of Alameda County adopted a resolution by which the County offered to accept responsibility to maintain, repair, and replace the bridges if the United States would equip them with electrical operating machinery, establish harbor lines along the tidal canal, and agree to lease frontage thereon for the construction of wharves and warehouses (R. 169).

In accordance with the offer of the County mentioned above, the United States installed electrical operating machinery on the bridges, established harbor lines, and made available to the adjacent property owners a twenty-five-foot-wide strip of land, bordering each side of the canal, so that warehouses and wharves could be constructed, and the canal was opened to navigation. After electrical operating machinery was installed the bridges could be opened and closed in from two to three minutes.

On September 3, 1910, the Secretary of War issued a license, revocable at will, to the County of Alameda for the control of the three bridges in question (R. 170). On November 10, 1913, the Board of Supervisors of Alameda County accepted the license by an appropriate resolution (R. 172).

The cities of Oakland and Alameda have enjoyed a steady growth (R. 139), and the County has, with Federal aid, recently replaced the highway bridges at Park Street and High Street with modern structures

(R. 135). However, the County notified the United States that it intended to cease operating the Fruitvale Avenue bridge at midnight, December 31, 1939 (R. 176), and the railroad notified the District Engineer, War Department, in San Francisco, that it expected the United States to maintain the bridge in question (R. 178). The County is now operating the bridge under a temporary arrangement whereby it will lose no rights it may have in the premises.

The County stated in its notice to the United States that the reason why it would no longer operate the Fruitvale Avenue bridge was a decision of the District Court of Appeals of the State of California, in and for the Third Appellate District, in a cause entitled *County of Alameda* v. *Ross,* 32 Cal. App. (2), 135; 89 Pac. (2) 460. This decision is discussed below.

After the receipt of the notices mentioned above the United States instituted this action in which it is prayed:

That the court order specific performance by the County of its agreement with the United States to operate, maintain or rebuild the Fruitvale Avenue bridge; that the rights of all parties be declared; and for the other temporary and permanent relief as more fully appears from the prayer of the complaint.

ARGUMENT

I

Reply to appellant's argument on the facts

The Tidal Canal was not open to navigation prior to 1913

The question as to whether or not a particular body of water is "open to navigation" is a question of fact

(*Healy* v. *Joliet, etc. P. Co.*, 116 U. S. 191; *Forestier* v. *Johnson*, 164 Cal. 24, 127 Pac. 156). And being a question of fact, the burden of proving navigability is upon the party affirming it (*Mintzer* v. *North American Dredging Co.*, 242 Fed. 553, aff. 245 Fed. 297).

The only "facts" before the Court as to the navigability or nonnavigability of the Tidal Canal are set forth in paragraph VII of the stipulation of facts (R. 131) and in Exhibit 3, which is attached to the stipulation (R. 167). The three bridges are described in paragraph VII, which goes on to say:

> It took approximately thirty minutes to open and thirty minutes to close each of these bridges. * * *
>
> Prior to said installation of electrical operating machinery the United States did not regularly operate said bridges, but did, on occasions, open and close them on request of private interests for the passage of vessels; private interests on occasions also opened and closed said bridges on their own responsibility for the passage of vessels which could not clear said bridges when closed; and boats, barges, and scows which could clear said bridges when closed plied up and down said Tidal Canal.

Upon analysis it at once becomes apparent that there is nothing in this statement to show how often the "occasions" happened when the United States operated the bridges, nor how often private interests had "occasion" to operate the bridges on their own responsibility. Moreover, it does not appear how

many, nor how often, "boats, barges, and scows which could clear said bridges * * * plied up and down said Tidal Canal." So far as the agreed statement is concerned, these things may have occurred ten times a day or once a year. But one definite fact was agreed upon, viz: that prior to the installation of electrical operating machinery it took one hour to open and close each of the three bridges. This would delay traffic for a total of three hours each time a vessel which could not clear the bridges when closed passed up or down the Canal. In 1910 the City of Alameda had a population of 23,383, and the City of Oakland had a population of 150,174 (R. 138–9), and it is only reasonable to assume that cities of this magnitude would not often permit such a delay through the bottlenecks of traffic created by the bridges.

The Court, however, need not speculate as to whether the Canal was "open to navigation," prior to the time electrical operating machinery was installed on the bridges, since a contemporaneous statement was made by the Board of Supervisors of the County itself in the Resolution of December 6, 1909 (R. 167), where the unequivocal statement is made that—

> Whereas, that portion of the Canal between said bridges *has never been open to navigation.* [Italics supplied.]

Whether the Board of Supervisors had authority to bind the County by the offer contained in this Resolution is beside the point in determining the question of fact now under discussion. It is invited to the atten-

tion of the Court as a statement of fact, made by those authorized to represent the appellant, at the very time in issue, and certainly greater weight should be given to it than to the speculations of counsel.

It is submitted that in view of the uncertainties contained in the stipulation as to whether or not the Canal was "open to navigation," and in view of the positive statement of the Board of Supervisors of the County that it was not, the appellant has utterly failed to sustain the burden imposed upon it to prove the contrary, and the court below was correct in its finding that the Canal was not, in fact, open to navigation prior to 1913 (R. 252).

II

The County of Alameda entered into a valid binding contract to operate and maintain the Fruitvale Avenue Bridge

(a) The license was issued as an acceptance of the offer of the county contained in the resolution of December 6, 1909

Throughout its brief the appellant argues that "the resolution of 1909 must be construed as an offer, the license of 1910 as a counteroffer, * * * and the resolution of 1913 as an acceptance of said counteroffer" (Brief, pp. 85–6). An analysis of the three documents concerned, and of the Rivers and Harbors Act of June 25, 1910 (36 Stat. 630, c. 382), will demonstrate the fallacy in this argument, and the following comparative table shows conclusively that the three documents in question constitute an offer, an acceptance, and the ratification of the acceptance, which thereafter ripened into a binding contract upon performance by the United States.

Resolution of Dec. 6, 1909, exhibit 3 (R. 167)	Rivers and Harbors Act of June 25, 1910	License of Sept. 3, 1910, exhibit 4 (R. 170)	Resolution of Nov. 10, 1913, exhibit 5 (R. 172)
No provision has ever been made by United States to operate bridges. That portion of Canal between bridges not open to navigation. Recommendation has been made by officer of United States that bridges be turned over to County. The County agrees to accept the bridges, *provided:* (1) That the bridges be equipped with electrical operating machinery. (2) That the United States lease the water front *on such terms as it may see fit.* (3) That the United States establish harbor lines so as to permit the construction of wharves and warehouses.	The three bridges heretofore built by the United States may be turned over to the local authorities in the discretion of the Secretary of War. So much of the appropriation as shall be necessary to meet the terms of the transfer may be expended by the Secretary of War.	Recites provisions of Rivers and Harbors Act of June 25, 1910, authorizing Secretary of War to turn the bridges over to the County. Grants license to County subject to following conditions: (1) That bridges shall be freely open to public. (2) That bridges shall be under supervision of Engineer officer. (3) That the United States shall equip bridges with electrical operating machinery. (4) That County shall maintain and repair bridges. (5) That County shall maintain bridge tenders to operate bridges as "required in the interests of navigation and street traffic."	Recites that County has previously agreed to accept said bridges, *provided:* (1) That bridges were equipped with electrical operating machinery. (2) That the United States lease the water front of the Canal under such conditions as it might see fit. (3) That the United States establish harbor lines so as to permit the construction of wharves and docks. That on September 3, 1910, the Secretary of War issued a license subject to certain conditions. That the United States had equipped the bridges with electrical operating machinery in accordance with the provisions of paragraph 3 of the license. That the United States has performed all things required by it to be performed. That the County accepts the bridges subject to the terms of the License.

The legislative history of the Rivers and Harbors Act of June 25, 1910, shows conclusively that when Congress enacted that portion of the Act dealing with Oakland Harbor it intended to and did authorize the Secretary of War to accept the definite offer of the County to operate and maintain the bridges. Thus

in Senate Report No. 527 of the Sixty-first Congress, Second Session, dated April 11, 1910, the following statement appears on page 615:

> In connection with this improvement a Tidal Canal connecting San Leandro Bay with Oakland Channel was excavated by the United States. This canal was intended for flushing purposes only, and no provision was made for operation of bridges over it which are owned by the United States and are provided with draws. A demand appears to have arisen for the opening of the canal to navigation, as explained in the district officer's report, but the bridges form an impediment to such use, and he recommends that they be turned over to local authorities, who have signified their willingness to accept and operate them.

It is submitted that the foregoing analysis of the three documents in question, when read in the light of the legislative history of the Rivers and Harbors Act of 1910, make it absolutely clear that they are each an essential part of the entire contract in controversy here, and that together they make up the contract in question.

(b) The county of Alameda had and has authority to operate and maintain the Fruitvale Avenue Bridge

The appellant cites a number of authorities defining the powers of County officers in support of the proposition that counties cannot act beyond the express or implied powers granted to them by their charters, or by legislative acts (Brief, pp. 16 et seq.). This, of course, is settled general law, but, it is submitted,

the rules invoked by the appellant have no application to the case at bar for the following reasons:

The California courts have repeatedly held that the powers and jurisdiction of Boards of Supervisors of Counties include such implied powers as are necessary to the exercise of express powers. Thus, in 7 Cal. Jur. 449 the rule is stated that

> Boards of Supervisors are creatures of the statute, and the authority for any act on their part must be sought in the statute. But while their jurisdiction is confined within the statutory limits, still it includes not only the powers expressly enumerated, but also those implied powers which are necessary to the exercise of the powers expressly granted, except in the instances where such implied power is expressly or impliedly prohibited.

See also: *H. D. Haley & Co. of California* v. *McVay, County Auditor,* 70 Cal. App. 438, 233 Pac. 409; *Couts* v. *County of San Diego,* 139 Cal. App. 706, 34 Pac. (2d) 812.

Sec. 32 of the Charter of Alameda County provides:

> SEC. 32. The County Surveyor, subject to such rules and regulations as shall be prescribed by the Board of Supervisors, shall have direction and control over all work construction, *maintenance, and repair* of roads, highways, tunnels, viaducts, conduits, subways, *and bridges.* [Italics supplied.]

It is clear, therefore, that the Board of Supervisors had the power to maintain and repair the Fruitvale Avenue Bridge. And, having that power, the Board necessarily had the power to pay such maintenance

costs as were incurred from year to year. The repair and maintenance of highways and bridges is one of the principal functions of a county, and therefore the authorities cited by the appellant are not in point since all of them deal with situations where the county was clearly acting outside of the scope of any express or implied authority.

Dillon, in Vol. 1, at page 452 of his work on Municipal Corporations, quotes *Bridgeport* v. *Housatonic R. Co.,* 15 Conn. 475, where the general rule discussed above is set forth as follows:

> "In this country," says Church, J., "all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred. But if we were to say that they can do nothing for which a warrant could not be found in the language of their charters, we should deny them, in some cases, the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And therefore it has long been an established principle in the law of corporations, that they *may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted.* In doing this, they must [unless restricted in this respect] have a choice of means adapted to ends, and are not to be confined to any one mode of operation."

Certainly, one of the powers inherent in the County, under Section 32 of its Charter, is the construction, maintenance, or operation of bridges, and, as said

above, the County has "a choice of means adapted to ends." The very fact that the County is now operating, repairing, and maintaining the High and Park street bridges "under other arrangements between the United States and said county" shows that the County itself recognizes this principle of law (R. 135).

III

Congress had and has power to authorize the County to operate and maintain the Fruitvale Avenue Bridge even in the absence of an express or implied power in the County conferred by state law

In the case of *Luxton* v. *North River Bridge Company,* 153 U. S. 525, the Supreme Court held that—

> Although *municipal corporations* organized under the laws of the respective States derive their power almost exclusively from the State, yet circumstances may exist where the power of eminent domain may be derived from an act of Congress. Thus Congress, *under the power to regulate commerce,* may authorize the construction of a bridge across navigable waters [by a public corporation] between two states and the taking of private lands for that purpose upon making just compensation.

Here Congress was acting to improve the Tidal Canal for the purposes of navigation, and it follows that even admitting *arguendo* that the implied power of the County to operate and maintain the bridge is doubtful, nevertheless the United States had power to authorize the County to operate the bridge, as Congress did in this case, in the enactment of the Rivers and Harbors Act of June 25, 1910, authorizing the

Secretary of War to turn the bridges over to the County. In other words, there cannot be the slightest doubt but that Congress may create *quasi public* corporations for public purposes, or that Congress may authorize existing governmental agencies, or "a political subdivision of a state having corporate powers" (Cal. Pol. Code, § 3901) to exercise public powers not strictly within its charter.

In the case of *Haeussler* v. *St. Louis,* 205 Mo. 656, 103 S. W. 1034, a municipal corporation was authorized by Congress to condemn land upon which to construct a bridge. Part of the land was not only outside the corporate limits of the city, *but was outside the state in which the city was incorporated.* The court commented upon the case of *Luxton* v. *North River Bridge Co., supra,* and, in holding that that case was applicable, said:

> In the case at bar the city of St. Louis, a corporation, has the charter and legal authority to construct this bridge insofar as the State of Missouri and its laws are concerned. It has the specific grant from the Federal Government, giving it the power to exercise the right of eminent domain, not only in Missouri, but in Illinois. If Congress can charter a corporation to build a bridge spanning from one State to another and clothe it with the power to condemn property in either State, it certainly had the power to *add this power by grant,* to the powers already possessed by the city of St. Louis. *In short, if Congress can create a corporation with such rights, it can grant such rights to one already in existence.* Nor where the way provided for is a

> public way, for public purposes and public use, as in this case, can there be any distinction between granting such rights to a municipal corporation, rather than to a private corporation? The municipal corporation had the right to go beyond its corporate limits and acquire property for this public municipal purpose, and Congress simply says, that with our power over interstate commerce, by land as well as by water, you can extend or make your public highway over a navigable stream, and do what we can do, i. e., take private property therefor, compensating the owner as provided by law. [Italics supplied.]

In other words, the County of Alameda can be authorized by Congress to do what the United States can do; i. e., operate the Fruitvale Avenue bridge.

The decision of the Missouri court in *Haeussler* v. *St. Louis,* is reinforced by Federal authority in *Latinette* v. *City of St. Louis,* 201 Fed. 676, a condemnation action brought in Illinois, by the City of St. Louis, a Missouri municipal corporation, involving the identical bridge and circumstances discussed in the *Haeussler* case. In holding that Congress had authority to confer Federal powers on an existing municipal corporation, the Court said:

> That the construction and operation of the bridge across the Mississippi, so that the bridge should not obstruct navigation of the waterway, and that the bridge and its necessary approaches might serve as a postroad and as a landway for interstate commerce, were national matters, that the nation had the right itself to build and maintain the bridge and approaches,

> and, for the purpose of acquiring land for the approaches, to exercise the power of eminent domain either directly or through a corporation created by it for that end, without the consent or over the objection of the state—are propositions too well settled to warrant elaboration or debate. *Kohl* v. *U. S.*, 91 U. S. 367, 23 L. Ed. 449; *California* v. *Pacific R. Co.*, 127 U. S. 39, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891; *Wilson* v. *Shaw*, 204 U. S. 24, 27 Sup. Ct. 233, 51 L. Ed. 351. Contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. *In reason the material thing is the principal's authority, not the parentage or birthplace of the agent.* [Italics supplied.]

In the case at bar the United States had authority to confer or grant power to the County to operate the bridge under an agreement with the United States.

It is submitted that, first: The County has express and implied power to operate the bridge in question, and, second: Even if the County does not have such power deriving from the state, nevertheless Congress had authority to confer such power on the County, as was done through the enactment of the Rivers and Harbors Act of June 25, 1910.

It is submitted that (a) the Resolution of December 6, 1909, the License of September 3, 1910, and the Resolution of November 10, 1913, must be con-

strued together, and when so construed evidence a valid contract, and (b) that the County of Alameda had authority and power to enter into such contract with the United States.

IV

The expenditures made by the County to operate and maintain the Fruitvale Avenue Bridge were not gifts to a private corporation of public money prohibited by Section 31 of Article IV of the California constitution

In Part III of its Brief the appellant argues that the contract involved here is void because it requires the County to "make a gift of its tax monies to a private railroad corporation" (Brief, pp. 42, et seq.). This argument is based upon the obvious fallacy that the obligation of the County is to the railroad companies, and not to the United States. The fallacy in appellant's argument in this respect is demonstrated by the following short analysis of the facts:

(a) Under the decree of condemnation an obligation was imposed upon the United States to construct "suitable bridges" at the places where highways or railroads were then situated (R. 165).

(b) This was done by the United States, and the Fruitvale Avenue Bridge was maintained by the United States until 1913 (R. 135).

(c) Prior to 1913 the County offered to take over the bridges, provided the United States would do certain things (R. 167).

(d) These things were done by the United States, in compliance with the County's offer, and the bridges were turned over to the County under the contract (R. 175).

(e) This contract was between the County and the United States, and the railroad was not a party to it.

(f) Under the contract the obligation of the County to operate and maintain the Fruitvale Avenue Bridge *was to the United States* and not to the railroad.

(g) Any benefit the railroad received because of the operation and maintenance of the bridge by the County was an incident to the contract between the county and the United States.

(h) Hence the moneys expended by the County to operate or maintain the Fruitvale Avenue bridge were not a gift of public funds to a private corporation, but were expended in compliance with the contract between the County and the United States.

This is a simple factual situation which needs no citation of authorities. In *County of Alameda* v. *Ross,* 32 Cal. App. (2) 135, 89 Pac. (2) 460, however, the court held that the expenditure made by the County to operate and maintain the Fruitvale Avenue bridge was an expenditure "of public money for the *sole* benefit of a private corporation." [Italics supplied.] It is submitted that the above factual analysis shows the error of the California court in this respect, and it is obvious that the court was led into this error by the omission from the stipulation of facts upon which it based its decision of any mention of the Resolution of December 6, 1909 (R. 141). Appellant attempts to explain this omission, for which appellant was responsible, by the specious argument that the Resolution of December 6, 1909, was summarized in the Resolution of November 10, 1913, which was before the California Court (Brief, p. 103). However, the fact of

the matter is that the California court *did not have the 1909 Resolution before it,* and, for that reason did not mention it in its decision, nor consider its effect, as is shown by the fact that the court said:

> The installation of electrical apparatus by the Government for the opening and closing of the drawbridges, *under the terms of the license prior to its execution.* [Italics supplied.]

did not furnish an independent consideration.

The statement italicized above demonstrates the error into which the court was led by the omission of the 1909 Resolution from the stipulation of facts upon which it based its decision. It is obvious that the court would not have said that the bridges were equipped with electrical operating machinery "under the terms of the license" if the court had had before it the 1909 Resolution in which the county offered to accept the bridges if they were so equipped. Moreover, the court was led into making a serious misstatement of fact in stating that the bridges were so equipped "prior to the execution of the license," since paragraph 3 of the license itself (R. 171) constituted the authority under which the electrical operating apparatus was installed *in compliance with the County's offer.* Thus, through the omission of the 1909 Resolution from the statement of facts in *County of Alameda* v. *Ross,* the court was induced to believe that the electrical operating machinery was installed on the bridges as an independent and unconnected act of the United States *prior* to the execution of the license, and that therefore such improvements would not constitute consideration for the acceptance of the bridges

by the County. It is submitted that the facts in that case show beyond a doubt that the electrical machinery was installed on the bridges as an acceptance of the County's offer, and that the license was merely the formal authorization of the Secretary of War that the improvements demanded by the County be made.

The appellant argues that because the 1909 Resolution was mentioned in the 1913 Resolution, which latter document was before the court in *County of Alameda* v. *Ross,* the California court necessarily considered the 1909 Resolution. The fallacy in this argument is demonstrated by the analysis of the statement of the court quoted above, and by the erroneous statement of facts upon which the court relied. Thus, in stating the stipulated facts upon which the court based its decision, the court said:

> In 1901 the government constructed the Fruitvale Avenue bridge and the other two bridges across the estuary, each of which it maintained until 1913. September 3, 1910, the Secretary of War issued to the Board of Supervisors of Alameda County, pursuant to an Act of Congress * * * the revocable license to maintain and operate the three bridges which license is the subject of controversy in this proceeding.

The effect of this omission was to make the California court believe that the original *offer* emanated from the United States, and is unquestionably what led the court into its error in holding that the installation of electrical operating machinery was no consideration for the contract. Indeed, if, as the California court was induced to believe by this omission,

the electrical machinery had been installed on the bridges *prior* to the date of the license, and as an independent act of the United States unconnected with any prior negotiations with the County, then the decision might be supportable. But, as has been shown above, the court did not have the true facts before it, and, inasmuch as the appellant was responsible for this, its argument that the mere summary of the 1909 Resolution in the 1913 Resolution advised the court of the true situation is contradicted by the court's own opinion.

The need for protecting the United States from the effect of judgments in cases to which it is not a party is illustrated here with sharp lines. Not only was an effort made to bind the United States by the decision of a State court in a case to which the United States was not a party, but that decision was obtained on a record of facts that omitted the key fact in the situation on which the rights of the United States turn.

V

The contract between the County and the United States does not violate Section 18 of Article XI of the Constitution of California forbidding a County to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year

As we understand the argument and cases cited in Part II of appellant's brief (pp. 29 et seq.) they are to the effect that the agreement between the County and the United States is in violation of Section 18 of Article XI of the California Constitution because the

total liability of the County became fixed when it accepted the license, and

> the duties and obligations of the County of Alameda, if any, were certain, definite, and fixed and * * * the liability here sought to be imposed, though not definitely fixed or even estimated in dollars and cents, would inevitably exceed the income and revenue provided for the fiscal year in which the contract, if any, was made (Appellant's Brief, p. 39).

The appellant relies on *Chester* v. *Carmichael,* 187 Cal. 287, 201 Pac. 925, and other authorities, in support of the proposition that in cases where the entire consideration on a contract has been furnished to a county, upon an agreement for future payments by the county, the "debt is created at once," and the agreement is therefore in violation of the constitutional prohibition under discussion. We have no quarrel with the authorities cited by appellant, but submit that they do not apply to the facts in this case.

In paragraph XV of the Stipulation of Facts (R. 135–6) the amounts paid by the County each year since 1913–14 to repair and maintain the Fruitvale Avenue bridge are set forth, and it was agreed by the parties that the revenue and income provided for the County for each year was sufficient to meet this expense during each year. In other words, it is agreed that in no one year did the County become obligated beyond the constitutional limits.

Moreover, the California decisions are clear that contracts of the sort here involved are wholly outside the

prohibition of the constitutional indebtedness limitation.

The leading case holding that such an agreement is not a violation of the Section 18 of Article XI of the California Constitution is *Krenwinkle* v. *City of Los Angeles,* 4 Cal. (2) 611, 51 Pac. (2) 1098. In that case the city leased certain property and agreed to pay a certain sum for the first year, and an agreed annual rental thereafter. The aggregate amount of the payments exceeded the income and revenue of the city for any one year. In holding that this was not a violation of the Constitutional prohibition, the court said:

> It is well-settled law in this state that the execution of a bona fide lease for a term of years does not create an immediate indebtedness or liability in excess of the installment of rent presently due. Appellant has apparently marshaled the total of the amounts of the installments to fall due during the terms of years of the leases in order to allege an aggregate of the purported positive, direct liability or municipal debt. Such construction of the leases is not a proper one under the authorities. This court has held that contracts like the leases here being examined do "not create any liability at the time they [are] executed, except a contingent future liability." *Doland* v. *Clark,* 143 Cal. 176, 180, 76 P. 958, 960. "The city had the right," says the court in the opinion, 143 Cal. 176, at page 181, 76 P. 958, 960, "to make contracts, if otherwise unobjectionable, to continue for 5 years," and to provide for payments at different times (citing other decisions of this court). "In order for these contracts to appear void under the Con-

stitution," continues the court, "it must appear that an indebtedness or liability has been incurred for some year exceeding the income and revenue provided for such year." Plaintiff's complaint fails to show any such situation. The leading cases on this subject in this state are *McBean* v. *Fresno,* 112 Cal. 159, 44 P. 358, 361, 31 L. R. A. 794, 53 Am. St. Rep. 191, and *Smilie* v. *Fresno County,* 112 Cal. 311, 44 P. 556. In those cases, the authorities from other states are reviewed, and the provision of the Constitution, supra, is analyzed. All the city contracted to pay in the case of the leases now before us was one sum for the first year of the term, payable in advance, and an agreed annual rental thereafter, payable in equal monthly installments. Such a lease is valid and creates no indebtedness for future rentals. *Walla Walla* v. *Water Co.,* 172 U. S. 1, 19, 20, 19 S. Ct. 77, 43 L. Ed. 341; *City of South Bend* v. *Reynolds,* 155 Ind. 70, 57 N. E. 706, 707, 49 L. R. A. 795.

Nowhere in the leases under consideration is there anything to indicate, nor does appellant claim that the lease contracts are anything more than leases. Each lease, it is true, contains an option granting to the city the right to purchase the leased property when all rentals and other charges are paid, and the city has otherwise complied with the terms and provisions of the leases. The purchase price does not decrease with the amount of rent paid; neither can the rentals paid be applied on the option price. The leases provide that the rental paid is for and in consideration of the use and occupation of the property which the city receives and for the continued quiet use and enjoyment of it during the

> term for which the installment is paid. The sole debt or liability created by the leases is "that which arises from year to year in separate amounts" (*McBean* v. *Fresno, supra*), as the lessor furnishes the quiet use and enjoyment of the leased premises. The nature and effect of these leases serve to distinguish them from the leases construed in such cases as *City and County of San Francisco* v. *Boyle,* 195 Cal. 426, 233 P. 965, *Mahoney* v. *San Francisco,* 201 Cal. 248, 257 P. 49, 57, and other cases in which the leases create a "direct or indirect" obligation on the lessees to pay the total price at the time the leases are entered into, even though the payments are to be made over a term of years. As to such contracts see *California Pac. Title & Trust Co.* v. *Boyle,* 209 Cal. 398, 407, 287 P. 968. In cases like that presented by the leases at bar, the indebtedness is not created until the consideration has been furnished; in the others, the debt is created at once, the time of payment only being postponed. *Walla Walla* v. *Water Co., supra.*

In the case at bar the County occupied the bridge and its obligation to pay for the operation and maintenance of the bridge does not accrue except from year to year. Therefore, the appellant's argument that the agreement is in violation of section 18 of Article XI of the California Constitution is not in point because "the indebtedness is not created until the consideration has been furnished," i. e., the County is under no present obligation to pay for the operation and maintenance of the bridge in the future.

In holding a contract for the disposal of sewage over a period of years not a violation of this provision of the

California Constitution, the court said in *McBean* v. *City of Fresno,* 112 Cal. 159, 44 Pac. 358:

> We base our views upon the conviction that, at the time of entering into the contract, no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed.

See also *Wykoff* v. *Force,* 61 Cal. App. 246, 214 Pac. 489. *Doland* v. *Clark,* 143 Cal. 176, 76 Pac. 958.

It is submitted that the contract between the County and the United States is valid because each year's expense is within the County's income, and the expense incurred each year is in consideration of the occupation and use of the bridge by the County for such year.

VI

The contract between the County and the United States is not void for lack of mutuality

In Part VII of its brief, appellant argues that the contract between the United States and the County is void for lack of mutuality because the license of 1910 is revocable. As a foundation for this argument appellant necessarily argues that—

> the resolution of 1909 must be construed as an offer, the license of 1910 as a counteroffer and hence as a rejection of the offer of 1909, and the resolution of 1913 as an acceptance of said counteroffer * * * (Brief, pp. 85–6).

We have shown above that the facts do not justify this assertion. The facts disclose that prior to 1913

the Tidal Canal was not open to navigation; that the harbor lines had not been established, and that the waters of the canal were not available to adjacent property owners. The County wanted this situation changed, and in order to secure that end, it offered to assume the expense of operating the bridge, and the fact remains that the United States *did* do the things requested by the County, and *did* expend the sum of $21,358.80 in the electrification of the bridges (R. 135). Whether this was a good or bad bargain for the County is of no interest to the court. As was said in *Skidmore* v. *West,* 186 Cal. 212, 199 Pac. 497:

> With the question of the wisdom of this contract insofar as the county was concerned, and especially with regard to the method and amount of compensation provided, the courts have nothing to do, in the absence of a claim of fraud or mistake (199 Pac. at p. 501).

In connection with the question as to whether or not the fact that the harbor lines could be changed at the direction of the Secretary of War affects the situation, the *fact* remains that the adjacent property owners who constructed wharves or warehouses on the Government property have enjoyed its free use up to the present time—a period of twenty-seven years (R. 448) and the *fact* remains that the United States did expend the sum of $21,358.80 in the electrification of the bridges.

We have argued above that the contract between the County and the United States was not in violation of Section 18 of Article XI of the California Constitu-

tion because the liability of the County to operate the bridge was not an immediate debt but accrued from year to year. We submit that there is nothing inconsistent between that argument and the argument in this section of this brief that the contract is not void for lack of mutuality because of the fact that the license may be revoked by the Secretary of War.

It is the position of the appellee that a fair and reasonable interpretation of the Resolution of 1909, the License of 1910, and its acceptance by the Resolution of 1913, leads to the conclusion that electrification of the bridge by the United States *at the request of the County,* was the consideration for the promise by the County to thereafter operate and maintain it. It thus appears clear that in this view the contract was *executed* by the United States, and lack of mutuality is not a defense, *Chicago M. & St. P. Ry. Co.* v. *United States,* 218 Fed. 228, *Mississippi Glass Co.* v. *Franzen,* 143 Fed. 501. Consequently, the fact that there was a second or subsidiary consideration in the form of the license authorizing the County to operate the bridge did not destroy the mutuality of the contract. In *Tennant* v. *Wilde,* 98 Cal. App. 437, 277 Pac. 137, the court instructed the jury:

> There is no contract at all because it is utterly indefinite. There is nothing definite as to time. If the defendant had not sought to continue it, there would have been no measure for damages. There is nothing he could allege or prove as to how long his employment was to last; no agreement that he would employ him for any particular length of time.

In reversing the judgment the court said:

> (At page 139:) It is upon this point that respondents argue for an affirmance of the judgment. They urge that the contract is severable, one part being a promise by plaintiff Clarence S. Tennant to work as a carpenter and the other, his alleged guaranty that cost of labor and material should not exceed $3,000, and that it is the guaranty which lacks mutuality.
>
> On this point it may be said that, where there is consideration for any of the agreements specified in a contract the contract as a whole cannot be said to lack mutuality or consideration, nor can any particular promise or agreement contained therein be singled out and deemed inoperative because no special or particular consideration appears to have been given or promised for it. Mr. Page in his "Law of Contracts" thus states the rule:
>
> (At pages 861 and 862:) While a consideration is a necessary element of every contract, it is not necessary that each separate promise or covenant should have a distinct consideration. If there is but one consideration offered in return for several promises, and it is accepted for them together, it will support them. This principle is often invoked in question of mutuality of obligation. If A gives value for two or more promises from B, B cannot claim that one of such promises was not supported by consideration, though the parties have not apportioned the consideration to the separate promises. * * *

The language quoted above is clear and unequivocal—if there is consideration for any part of an agree-

ment, the whole contract cannot be said to lack mutuality. Certainly, the expenditure of $21,358.80 by the United States for the electrification of the bridges constituted sufficient consideration. The county relies, on *County of Alameda* v. *Ross,* however, where the court said:

> There is no merit in the petitioner's contention that the installation of electrical apparatus by the government for the opening and closing of the drawbridges, under the terms of the license prior to its execution, furnishes an independent consideration which makes the agreement binding. It still lacks mutuality. It is uncertain and revocable at will, rendering the county liable for the expenditure of large sums of public money for the sole benefit of a private corporation with no assurance of retaining the privilege of operating and using the bridges for a single day (89 P. 2d 465).

As was stated above, the court was undoubtedly led into this error by the incomplete and misleading stipulation of facts upon which it based its decision, since the court did not have before it the Resolution of 1909 in which the County offered to accept the bridges provided the United States would electrify them, so that the canal would be open to navigation. Certainly, if the court had had all of the facts before it, it could not have said that an offer, acceptance, and performance constituted no contract, as in effect it did say in that portion of its decision quoted above.

If the theory of the defendant is accepted that "the electrification of the bridges was a mere incident of the contract; a minor stipulation subordinate to the

real object for which the contract was entered into, to wit: the control of the bridges by the County" (Brief, p. 88), then the contract between the United States and the County can be sustained upon the theory that the contract must be construed as a unilateral agreement under which the County agreed to operate and maintain the bridge in consideration of the control of the bridge granted to the County by the United States which ripened into a binding obligation upon performance by the United States. In other words, under this theory the promise or offer of the County was that it would operate and maintain the bridge if the United States would electrify and grant control of the bridge to the County. Neither party was bound when the offer was made, but once the United States had performed its side of the agreement by the electrification of the bridge, and by turning it over to the County, the County became bound to fulfill its promise.

In *Mathewson* v. *Fitch,* 22 Cal. 86, the court said, at pp. 93–4:

> The promise was not a contract depending upon a mutual promise for a consideration. The doing of the thing specified constituted the consideration which made the promise binding. In the case of *Train* v. *Gold* (5 Pick. 380) the Court states the rule in these words: "Thus, if A promises B to pay him a sum of money if he will do a particular act, and B does the act, the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act. In the intermediate time the obligation of the contract or promise is suspended;

for, until the performance of the condition of the promise there is no consideration, and the promise is *nudum pactum;* but on the performance of the condition of the promise, it is clothed with a valid consideration which relates back to the promise, and it then becomes obligatory." To the same effect is the case of *Lousdale* v. *Brown* (2 Wash. 148).

In *Marin Water & Power Co.* v. *Town of Sausalito,* 168 Cal. 587, 143 Pac. 767, the court said:

> And even contracts unilateral at first are sustained upon execution of the optional consideration. In this pleading it is alleged that at all times the plaintiff was ready, able, and willing to perform and did perform all of its duties arising under the agreement, including the supplying of an abundance of pure, fresh water; so that even if we should look upon the obligation of plaintiff to use its best endeavors as wanting the quality of mutuality at first, the perfect success of such endeavors, as pleaded, makes the agreement one capable of enforcement (*Spires* v. *Urbahn,* 124 Cal. 110 (56 Pac. 329); *Bell* v. *Equitable Gas Light Co.,* 141 Cal. 707 (75 Pac. 329); *Bell* v. *Southern Pacific R. R. Co.,* 144 Cal. 573 (77 Pac. 1124)).

In 6 Cal. Jur. 213, the rule is stated as follows:

> As a unilateral contract is not founded on mutual promises, the doctrine of mutuality of obligation is inapplicable to such a contract. Accordingly, where one makes a promise conditioned upon the doing of an act by another, and the latter does the act, the contract is not void for want of mutuality, and the promisor is liable though the promisee did not at the time

> of the promise engage to do the act; for, upon the performance of the condition by the promisee, the offer is accepted, the promise becomes binding, and the contract is clothed with a valid consideration.

In this view of the case the County made a promise "to assume all costs of future repair, operation, and replacement" of the bridge "conditioned upon the" electrification and transfer of control of the bridge by the United States. The United States performed the acts demanded by the County and "the contract is not void for lack of mutuality."

VII

The contract between the United States and the County is not void for uncertainty

Sections 1643, 1647, and 1649 of the California Civil Code set forth the general rules for the interpretation of contracts, as follows:

> SEC. 1643. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.

The intention of the parties here was that the County should operate and maintain the bridge—which it has done for a period of twenty-seven years.

> SEC. 1647. A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.
>
> SEC. 1649. If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor

> believed, at the time of making it, that the promisee understood it.

The three documents constituting the contract in this case are unambiguous as to what the parties understood the contract to be, and the fact that prior to 1913 the canal was not open to navigation; that no harbor lines had been established; and that the bridges were not equipped with electrical operating machinery are sufficient explanations of the "circumstances under which the contract was made, and the matter to which it related."

There is no question but that at the time this contract was entered into the United States and the County intended to enter into a valid and binding agreement, and—

> As between two permissible constructions, that which establishes a valid contract is preferred to that which does not, since it is reasonable to suppose that the parties meant something by their agreement, and were not engaged in an attempt to do a vain and meaningless thing. The parties are deemed to have intended a lawful, rather than an unlawful, act, and their agreement is to be construed, if possible, as intending something for which they had the power to contract (6 Cal. Jur. 268).

In *Greenfield* v. *Sudden Lumber Co.,* 18 Cal. App. (2) 709, 64 Pac. (2) 1007, the court laid down the general rule of interpretation of contracts as follows:

> Where it is manifest that persons have endeavored to contract one with the other, courts are constrained to find in favor of the success rather than of the failure of their efforts where

> evidence is present warranting such inference. As said in *Meyers* v. *Nolan* (Cal. App.), 63 P. (2d) 1216, 1217: "The law does not favor the destruction of contracts because of uncertainty but will, if feasible, so construe contracts as to carry into execution the reasonable intentions of the parties if they can be ascertained."

With these general rules in mind, we shall discuss the proposition (a) that the contract is not void for uncertainty because the license is revocable, and (b) that the contract is not void for ambiguity.

(a) The contract is not void for uncertainty because the license is revocable

The fact that a contract does not provide for a definite time for its termination does not render it void for uncertainty. Thus, in *Noble* v. *Reid-Avery Co.*, 89 Cal. App. 75, 264 Pac. 341, the contract provided for the exclusive sale of welding rods within a specified territory so long as the seller gave "faithful service to the trade" and produced "business that warranted the territory allotted to it." In answer to the argument that the contract was void for uncertainty the court said:

> The principal reasons urged against the validity of the contract is that it lacks definiteness, certainty, and mutuality, in that it is claimed that it cannot be ascertained from the contract what period of time appellant was to refrain from transacting business in the allotted territory, nor the duration of the sales agency conferred upon respondent by appellant. However, the duration of the contract seems to be

settled by the allegations in the answer hereinbefore set forth (faithful service and production of business), which not only is conclusively presumed to be true for the purpose of this appeal, but is fully borne out by the testimony of the witnesses in the case.

In *Sutliff* v. *Seidenberg et al.,* 132 Cal. 63, 64 Pac. 131, the contract was to remain in force "as long as our goods find a ready sale on this coast," and the court held that it was not void for uncertainty.

To paraphrase the contract involved in the *Sutliff* case it may be said that the contract involved here is to remain in force so long as the Secretary of War does not, in the exercise of his general powers, revoke the license. It is submitted that such an interpretation would work no hardship on the County since the obligation of the County would cease immediately that the license was revoked if the Secretary of War in carrying out the duties of his office, found revocation necessary. Moreover, the parties have acted under the contract for a period of twenty-seven years, and have certainly expressed their intention as to how they believe their respective obligations under it should be construed.

Furthermore, the reserved power to the United States to revoke the license is no more than would have been reserved to the United States anyway by operation of law. The United States has paramount authority over navigable waters carrying with it power to revoke any such license. (*Greenleaf Johnson Lumber Co.* v. *Garrison,* 237 U. S. 251.)

(b) The contract between the United States and the County is not void for ambiguity

The County argues in its brief that the contract between the County and the United States is "void for uncertainty because of the ambiguity of its provisions." This argument is based upon several fallacies, the most glaring of which is the statement that because the United States was obligated under the decree in the *Crooks* case to construct "suitable bridges," it was obligated to install electrical operating machinery on them, and in doing that only did what it was "previously under obligation to do." Inasmuch as the first mention in the record as to the installation of electrical machinery on the bridges is contained in the 1909 Resolution, it at once becomes apparent that the appellant's argument has no support in fact.

Appellant argues that the contract is ambiguous (Brief, p. 98) because of the provisions of the Rivers and Harbors Act of 1910 that the bridge be turned over to the County—

> upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities.

Even admitting *arguendo* that the provisions of the Act may have been ambiguous, nevertheless any latent ambiguity was cured when the license was issued, and the Secretary thus evidenced what conditions he thought were "equitable and just." The fallacy in appellant's argument is illustrated by the fact that appellant argues that the terms of the Rivers and Harbors Act made the contract ambiguous. This, of course, is

not true, since the Act was merely the authority under which the Secretary of War acted, and the contract itself is evidenced by the three instruments discussed herein.

The appellant also argues that, because the license provided that the bridge should "be under the supervision of the Engineer District in which the bridge is situated," the contract is ambiguous (Brief, p. 100). The fallacy in this argument lies in the fact that the bridge crossed a navigable waterway which was exclusively under the supervision and direction of the United States. This provision in the license amounts to no more than a statement of the law, since Congress has always had power to supervise bridges over navigable waterways—whether owned by the United States or a State agency. Thus, in *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, the Supreme Court held that a bridge over an interstate waterway, although erected under the sanctions of a State and not at the date of its erection—

> an illegal structure or an unreasonable obstruction to navigation in the condition, at that time, of commerce and navigation on the Monongahela River, the bridge must be taken as having been constructed with knowledge, on the part of all, of the paramount power of Congress to regulate commerce among the States, and subject to the condition or possibility that Congress might, at some time after its construction and for the protection or benefit of the public, exert its constitutional power to protect free navigation as it then was against unreasonable obstructions. * * *

It is obvious that the United States has always retained authority over the bridge in controversy here through the grant of paramount power to control navigable waters. Under the *Monongahela Bridge Co.* case above, the United States has such power over the Park and High Street bridges which are owned by the County, and it is thus clear that the question of title is unimportant as to this phase of the case.

VIII

The County of Alameda is now estopped to set aside its contract to operate and maintain the Fruitvale Avenue Bridge

It has been stipulated that the United States equipped the bridges in question with electrical operating machinery, and there is no conflict in the evidence that the United States made available to adjacent property owners the twenty-five-foot strip of land bordering the canal, and established harbor lines, so that a strip of valuable land bordering the canal, was made available to adjacent property owners, as is shown by the map marked Exhibit 10 (R. 390). The development of the canal area, all of which was for the benefit of the County, would have been seriously handicapped had the United States refused to equip the bridges with electrical operating machinery so that they could be expeditiously opened and closed, or to make available to the public easy access to the canal itself, or to permit the construction of wharves and warehouses on the twenty-five-foot strip of land bordering each side of the canal.

All of these things were done within the County of Alameda, at its special instance and request. As a result the County, and the public, benefited to an extent impossible to measure in dollars; also it must be conceded by all parties that a large amount of money was expended by the United States in this connection, and that the United States gave up valuable property rights.

In this view of the case it is clear that the County is now estopped to rescind or repudiate the contract to operate and maintain the Fruitvale Avenue bridge after enjoying, for a period of almost twenty-seven years, the benefits of the improvements made by the United States at the County's request, and after the United States had given up valuable property rights in connection with such improvements. The rule of equitable estoppel, as applied against counties, is stated in 7 Cal. Jur. at page 516, as follows:

> Public corporations, like individuals, are bound to act in good faith and deal justly. They are not permitted to enter into contracts involving others in expensive engagements, silently permit these contracts to be executed, and then repudiate them because certain statutory steps have not been pursued. A county may thus be equitably estopped by its acts, in the same manner as an individual, when acting within the scope of its powers. Under this salutary doctrine, it has been held that after paying money for a bridge which has been completed, and of which the county enjoys the benefit, a county is estopped to maintain an

> action to recover the money, if the contract under which it was paid, though legally defective, was not immoral, inequitable, or unjust.

In the case at bar the County not only permitted the United States to "enter into expensive engagements," but such engagements were entered into at the express request of the County, and for the benefit of the County. It is true that a county may not be estopped unless it was acting within the scope of its authority, but it has been shown above that the construction, operation, and maintenance of bridges is expressly within the powers of a county so that this question is not involved here.

In *County of Sacramento* v. *Southern Pacific Company,* 127 Cal. 217, the county agreed to pay the railroad company a stated sum in consideration of the construction by the railroad of an overhead pass on a railroad bridge; such overhead pass to be used for public-highway purposes and to be maintained by the railroad. After the work was performed by the railroad the county sought to recover the amount paid by it upon the ground that its contract with the railroad company had not been made as provided by statute, and therefore was not binding on the county. In commenting upon this proposition the Supreme Court of California said:

> Possibly in this case the law was not carried out * * *. But still, the all-important fact remains that these parties entered into the contract in the utmost good faith. The advice of the law officer of the county was taken, and he

advised that the contract was a lawful one and was sufficiently evidenced; the work contracted for was done; the money paid for the work; the party paying the money received full value for it, and still enjoys the benefits received from the contract. Under such circumstances a plain example of estoppel is before us, and by reason of that estoppel the plaintiff is forever barred from recovering the money involved in this litigation. * * *

But the power of a board of supervisors to construct bridges, to build and lay out roads, to secure easements in the form of rights-of-ways for public travel, are matters within the jurisdiction of the board of supervisors. * * * The county could buy a bridge or lease a bridge. * * * If a county may buy a bridge, or rent a bridge, it may purchase the exclusive right-of-way over a bridge. *We need not split hairs in giving a technical name to the interest which the county has in the bridge, but it is apparent to everyone that it has a substantial interest therein, and, in the absence of some claim or showing to the contrary, we may assume that such interest is full value for the money expended.* [Italics supplied.]

The case at bar presents a clear case of estoppel. The County of Alameda initiated the whole question of opening the canal to navigation and the installation of electrical operating machinery on the bridges. The United States accepted the County's offer, and expended money and gave up valuable property rights for the benefit of the County, and the County has en-

joyed the benefits it received for a period of almost twenty-seven years, but now seeks to repudiate the whole transaction. Under the facts of this case it is respectfully submitted that the County is now estopped to set aside or repudiate its contract to operate, maintain, repair, or replace the bridge in controversy.

IX

The California courts had no jurisdiction to determine substantial rights of the United States in *Alameda County* v. *Ross*

The appellant frankly admits that the California courts had no jurisdiction to determine substantial rights of the United States in *County of Alameda* v. *Ross* (Brief, p. 102). But it seeks to come in the back way by arguing that the United States is bound by *County of Alameda* v. *Ross* under the rule laid down in *Erie Railroad Co.* v. *Tompkins,* 204 U. S. 64.

This argument is based upon the fallacies that *County of Alameda* v. *Ross* is based on the same record of facts as the case at bar, or correctly states the law of California as to the facts of the case at bar, and upon the legal error that the *Erie Railroad* case applies to cases involving Federal questions.

We have shown above that the California court was led into error by the omission of the Resolution of 1909 from the stipulation of fact upon which it based its decision. *County of Alameda* v. *Ross* has all the earmarks of a "friendly suit," by which courts are sometimes led into innocent error to the detriment

of third parties. There can be no question but that the interests of the United States were so directly involved in *County of Alameda* v. *Ross* as to make the decision an absolute nullity.

Alameda County v. *Ross* was a mandamus proceeding instituted to determine whether the purchase of bolts to repair the railroad portion of the Fruitvale Avenue bridge was in violation of the California Constitution. The United States, of course, was not, and could not have been a party to that proceeding.

It is beyond argument that a state court has no jurisdiction in an action on a contract in which the United States is one of the contracting parties, and while the fact—

> That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can here be rendered. *Louisiana* v. *McAdoo,* 234 U. S. 627. See also *Minnesota* v. *Hitchcock,* 185 U. S. 373.

The practical effect of the judgment in *Alameda County* v. *Ross* if given the effect argued for by appellant would be that the United States would have to repair and rebuild the bridge in question. Therefore, it is clear—

> That the interests of the Government are so directly involved as to make the United States a necessary party, and therefore to be consid-

> ered as in effect a party, although not named in the bill. *Wells* v. *Roper,* 246 U. S. 335.

Under these circumstances it is plain that the effect of the judgment in *Alameda County* v. *Ross* so directly involves the interests of the United States as to make it a necessary party, and, being a necessary party to the controversy, any action of the State court to determine substantial rights of the United States is a nullity. Moreover, the United States had not given its consent to be sued in a state court in the type of proceeding involved in *Alameda County* v. *Ross* and therefore any proceeding in the state court which purports to affect the rights and interests of the United States is not within the jurisdiction of such court.

The fact that *Erie Railroad Co.* v. *Tompkins* does not apply is made clear by the decision itself, which states:

> Except in matters governed by the Federal Constitution, or by Acts of Congress, the law to be applied in any case is the law of the State.

Board of County Commissioners, Jackson County v. *United States,* 308 U. S. 343, holds that Federal and not State law determines whether the United States, suing on behalf of an Indian, can recover interest on county real estate taxes erroneously assessed upon the Indian's land within the county. The settled state rule was that no interest could be recovered, but the Supreme Court, although reaching the same result on

the basis of Federal law, expressly held that state law did not apply, and stated:

> Since the origin of the right to be enforced is the treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties, or statutes of the United States, and does not owe its authority to the lawmaking agencies of Kansas. Cf. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

That the California court did, however, undertake to interfere with an Act of Congress, is conclusively shown by the fact that the Court specifically stated in its opinion that the *"license is the subject of controversy in this proceeding."* The error of the Court in this regard is made doubly apparent because the proceeding involved was a mandamus action having to do with State officers.

In the case at bar the origin of the rights of the United States in the premises, derives first from its Constitutional power over navigable waters, and, secondly, through the enactment of the various Rivers and Harbors Acts having to do with the improvement of Oakland Harbor generally, and specifically through the Rivers and Harbors Act of 1910. These are "matters governed by the Federal Constitution or by Acts of Congress," and the laws of a State can have no application (*Frederick S. Deitrick, Receiver,* v. *Thomas E. Greaney,* 309 U. S. 190).

In *Byron Jackson Co.* v. *United States,* 35 Fed. Supp. 665, an action was brought against the United States

in the Federal Court in California on a contract made in the District of Columbia for the sale of pumps. The contract contained a clause providing for liquidated damages, and, in holding that such clause was enforceable under Federal principles, irrespective of the rule of *Erie RR.* v. *Tompkins,* and notwithstanding the law of California where the contract was to be performed, the Court said:

> It is inconceivable that the Congress of the United States, in surrendering a part of the sovereign's immunity, intended to subject the determination of the validity of contractual undertakings to the laws of each state rather than to the general laws of the United States. To have done so, would be to deprive the Government, when sued, of uniformity and similarity of principles. This, in the case of a government, the domain of which is as vast as that of the Government of the United States, would result disastrously.

It is, therefore, clear that the decision of the California Court in *County of Alameda* v. *Ross* is not applicable to the case at bar, because it is in direct violation of the rule—

> that federal courts do not follow state decisions as to Federal rights, whether arising under the Constitution, treaties, or statutes. Such rights are expressly excepted from the Rule of Decisions Act (28 U. S. C. 725), in fact, such an express exception is unnecessary (2 Ohlinger's Federal Practice 369).

Moreover, the doctrine of *Erie* v. *Tompkins* has never been applied by the Supreme Court except in cases

where the jurisdiction of the federal court rested exclusively on diversity of citizenship; and the opinions of the Supreme Court foreshadow that the rule will be confined to that class of case. See *Klaxon Co.* v. *Stentor Elect. Co.,* U. S. Sup. Ct., Oct. Term, 1940, No. 741, Decided June 2, 1941. See also *Royal Indemnity Co.* v. *United States,* U. S. Sup. Ct. Oct. Term, 1940, No. 817, Decided May 26, 1941.

X

The Court did not err in refusing to admit testimony from *United States* v. *Crooks*

Upon reading appellant's brief (pp. 117 et seq.) relative to the admissibility of Major Mendell's testimony in *United States* v. *Crooks* it now appears clear that such testimony was offered:

> (a) To "explain" the 1874 report put in evidence as appellee's Exhibit 8 (R. 353), and
>
> (b) To vary the decree of 1882 by which the United States got title to the land upon which the tidal canal was constructed.

This section of this brief will confine itself to a discussion of the two questions mentioned above.

(a) Major Mendell's testimony in *United States* v. *Crooks* is utterly immaterial in "explanation" of the 1874 report (Exhibit 8, R. 353)

The report in question was offered merely to show the historical background of this litigation (R. 469). An examination discloses very plainly that it is merely a preliminary report. Thus, on the next to last page there is the statement that—

> We will close this report by stating that there are many details connected with this improve-

> ment into which we cannot enter without prolonging this paper to an unreasonable length (R. 369);

and the last page contains the only reference to bridges as follows:

> Again, there will be land damages, and bridges will be required over the proposed canal (R. 370).

Major Mendell, the author of the report, himself testified that he not only had no authority to build a bridge at Fruitvale Avenue but that he had no authority at the time he testified to even construct the canal (R. 195). It is thus evident that at the time of the 1874 report, and at the time Major Mendell testified in the condemnation proceedings, no specific plans for specific bridges had been prepared or adopted.

The report is dated in 1874 and Major Mendell did not testify in the condemnation proceedings until eight years later. Thus his testimony is too remote to be material.

While Mendell was a defendant in the condemnation proceedings, his testimony is not here admissible as an admission against interest because the question of his title or interest is not involved here, while his testimony is sought to be introduced against the United States.

(b) Major Mendell's testimony is not admissible to vary the 1882 decree

While the appellant now argues that Mendell's testimony is material to "explain" the 1874 report, it was also offered to vary the decree of condemnation.

Thus, on pages 341 and 342 of the Record in the case at bar there is the following colloquy:

> Mr. COAKLEY. We feel Major Mendell's testimony should go in in its entirety, for whatever connection it may have, explaining this report, *describing the manner of the construction of the proposed canal.* * * * [Italics supplied.]
>
> The COURT. In that condemnation proceeding, they covered a certain field. This particular testimony you are asking to have was passed upon in that proceeding. In the findings in those proceedings, I presume they found everything essential or necessary to the case?
>
> Mr. TOOLE. Yes.
>
> The COURT. Therefore, it does not need the testimony of the individual witnesses before the Court now to be brought out if they had sufficient evidence upon which to predicate what they did find. You would want this Court to find something in the condemnation proceedings over and above what was actually found upon the proceedings; is that the point?
>
> Mr. COAKLEY. No; we say that the findings of fact, conclusion of law and decree and the opinions which are stipulated in this agreed statement of facts are ambiguous *in that they do not go into detail.* * * * [Italics supplied.]
>
> The COURT. In other words, you bind the Court by testimony of a witness who testified before the Court, even though the findings do not recite what type of bridges they were to be. In other words, he recommended a certain type

> of bridges; and you would enlarge the findings to embrace what he testified—that is it, is it not?
>
> Mr. COAKLEY. Yes, your Honor; that is proper.

The foregoing shows that the appellant frankly admitted that the whole purpose of the offer of Mendell's testimony was to add to and vary the decree and findings in the condemnation proceedings. Appellant's suggestion that such offer is material to "explain" the report is an attempt to do indirectly that which cannot be done directly. The report needs no "explanation" since it was merely a preliminary survey, made eight years prior to the time Mendell testified, and its only value to this court is to inform the Court of the historical background of the instant case.

The quotations from the Record set out above make it evident that any consideration by this court of this testimony must necessarily vary or enlarge the condemnation decree.

Thus at page 119 of its brief the appellant states:

> If at the time the decree was rendered it was contemplated that the canal would be constructed for navigation, then the Government was bound to construct and maintain a navigable waterway under said decree (in *U. S.* v. *Crooks*) and was also obligated thereunder to equip the Fruitvale Avenue Bridge for electrical operation * * *.

In view of the fact that the complaint, the opinion, the findings of fact and conclusions of law, and the

decree in *United States* v. *Crooks* were stipulated in evidence, and are silent as to the matters mentioned by appellant, it would vary the decree if it were determined by collateral evidence that "if" the United States acquired certain rights, additional duties not mentioned in any of the pleadings were imposed upon it. Neither Major Mendell, nor any other witness, could enlarge or modify the scope of the condemnation proceedings as defined in the complaint and which are found on page 145 of the Record in this case, as follows:

> That the United States of America is duly authorized and empowered to improve Oakland Harbor, in said County and State, in the interest of commerce, and for that purpose it becomes and is necessary to turn the water from San Leandro Bay or estuary through a tidal canal into the head of San Antonio estuary, so as to increase the tidal flow into and through said San Antonio estuary, which forms said Oakland Harbor, for the purpose of removing the sediment from the same, and thereby increasing the depth of water, and improving said Oakland Harbor.
>
> That to make and excavate said tidal canal for the flow of the tides into the head of San Antonio estuary—said Oakland Harbor—as proposed, it becomes and is necessary to have and use the tract or strip of land above described, over and across which to make and excavate the said canal.
>
> That this proceeding is instituted for the purpose of condemning said tract and strip of land

> for the use aforesaid; that the taking of said land is for a public use, authorized by law, and by the Government of the United States.

Nowhere in the Complaint in *United States* v. *Crooks* will the Court find any allegation to support defendant's statement, quoted above, that as a result of these proceedings the United States became obligated to provide a navigable waterway or to construct electric drawbridges.

We submit that there is no ambiguity in the decree in the *Crooks* case because of its silence as to how the canal was to be constructed. The court was silent on that question because the method of construction of the canal was not before it. The silence of a court as to a question not before it does not constitute an ambiguity. It is true that the decree placed the obligation on the United States to construct and maintain "suitable bridges" across the canal where public roads and railroads were then situated. This expression is not ambiguous. The purpose of the court was obviously to provide that the construction of the canal would not interfere with public travel, and to save harmless the county and the railroads since they had not asked for damages. The type of bridges to be built was necessarily left to the discretion of the United States because all plans for the construction of the canal were then in a preliminary state.

The matter before the court in the *Crooks* case was the condemnation of the land comprising the site of the proposed tidal canal. Under the complaint (R. 144) the only matters to be decided by the court were

first, the right of the United States to bring the suit, and, this question being decided in the affirmative, only the question of damages remained for decision.

The matter before the court in the instant case is the construction of an alleged contract between the United States and the County of Alameda. The issues in the two cases are neither connected nor related.

The *Crooks* case was a condemnation suit; this is a suit on a contract.

In *Marshall* v. *Hancock,* 80 Cal. 82, 22 Pac. 61—

> The controverted question in the court below was as to the genuineness of a deed from one Michael White and wife to Henry Hancock, under which the defendants claimed to be the owners of one-half of the real estate in controversy. The deed appeared on its face to have been regularly executed and acknowledged. The plaintiffs claimed it to be a forgery, and that Michael White was out of the state at the time it purported to have been signed and acknowledged. The court below, after hearing testimony as to the execution of the deed, held the same to have been executed and admitted it in evidence. * * *
>
> The defendants were permitted to introduce in evidence the testimony of White given in an action not shown to have been between the parties to this action, *or to have involved the matter in controversy here.* The object was to show declarations of White, who was deceased, tending to show that he executed the deed in controversy. The admission of this testimony was erroneous. [Italics supplied.]

The rule has been concisely stated in *Duffy* v. *Blake* (Wash.) 157 Pac. 480, in which the court held that—

> In order for evidence adduced at former trial to be available at subsequent trial, the two actions must concern the same subject matter, the issues must be identical, and proof must be directed to a fact material in both cases.

The case at bar and the *Crooks* case do not concern the same subject matter; the issues are different; and the offer of the defendant is not directed to a fact material in both cases.

In conclusion it is apparent that Mendell's testimony in 1882 cannot be said to explain, or bear upon the historical accuracy of the 1874 report. Its remoteness in point of time removes it from the field of logical relevance into which his contemporaneous declarations or testimony might be said to fall.

It is respectfully urged that the real reason for its offer is to create a basis for argument that the decree in the *Crooks* case imposed obligations upon the United States not therein expressed. The ambiguity urged as reason for the reception of the proffered evidence does not exist in the decree but is conjured up from the evidence itself and assumptions as to its effect on the court's decision in that case.

XI

CONCLUSION

A valid and binding contract exists between the County of Alameda and the United States under which the County is obligated to maintain, operate, or

replace the Fruitvale Avenue bridge; the California court had no jurisdiction to determine substantial rights of the United States; the benefit accruing to the railroad companies was a mere incident to the primary obligation of the County to the United States.

Respectfully submitted.

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U. S. GOVERNMENT PRINTING OFFICE: 1941